

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,776

JOHN FOSTER DULLES, SECRETARY OF STATE, APPELLANT

v.

MEYER L. CASMAN, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

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1 Filed April 5, 1954. Harry M. Hull, Clerk

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-'54

MEYER L. CASMAN, 501 COMMERCIAL TRUST BLDG., PHILADEL-
PHIA, PA., PLAINTIFF

v.

JOHN FOSTER DULLES, SECRETARY OF STATE, TWENTY-FIRST
AND VIRGINIA AVENUE, N. W., WASHINGTON, D. C., DEFENDANT

COMPLAINT FOR MANDATORY INJUNCTION

1. Plaintiff, Meyer L. Casman, is a citizen of the State of Pennsylvania and defendant is the Secretary of State of the United States, and resides in the District of Columbia. The matter in controversy exceeds the sum of \$3,000, exclusive of interest and costs. This action is also brought pursuant to Rule 81(b) of the Federal Rules of Civil Procedure.

2. Plaintiff is an honorably discharged veteran of the armed forces of the United States, having served on active duty in the Army during World War I.

3. Plaintiff was originally appointed as an attorney in the War Department on May 26, 1947, at the grade P-6, and was assigned to the Office of the Chief Counsel of the Office of Military Government, Germany, United States Area of Control (OMGUS) in Nurnberg, Germany. On December 13, 1947, plaintiff was promoted to the position of President Judge of the Military Government Court for Civil Actions with headquarters at Stuttgart, Germany, and

graded P-7. On December 12, 1948, plaintiff was promoted to be a member and judge of the Board of Review under Military Government Law No. 59 at Nurnberg, Germany, with a grade of P-8, and the salary of \$11,363.00, including European differential. Shortly thereafter plaintiff
2 was reclassified GS-15 with a base salary of \$10,500.00 plus European differential. During the entire time of his employment plaintiff maintained efficiency rating of "excellent".

4. The Board of Review was established by the Office of Military Government, Germany, United States Area of Control (OMGUS) to review decisions and claims for restitution under Military Government Law No. 59. Military Government Law No. 59 was enacted for the purpose of effecting "to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism".

5. On June 6, 1949, the President of the United States issued Executive Order 10062 establishing the position of United States High Commissioner for Germany (HICOG). Among other things the High Commissioner was given the authority "to exercise all of the governmental functions of the United States in Germany (other than the command of troops) . . .". The Occupation Statute, enacted pursuant to Executive Order 10062, was put into effect on September 21, 1949, and all functions, powers and responsibilities of OMGUS were transferred on that day to the High Commissioner.

6. On or about September 21, 1949 the office of the High Commissioner, with all his functions, powers and responsibilities, was transferred from the jurisdiction of the Secretary of Defense to the jurisdiction of the Secretary of State.

7. On or about September 21, 1949, the High Commissioner informed all members of the Board of Review of the transfer of all functions previous exercised by the Board of

Review to the existing United States Courts for Germany.

3 8. On October 7, 1949, plaintiff's employment as a member of the Board of Review was purportedly terminated as of November 3, 1949, in violation of Military Government Law No. 59, without cause, and without furnishing any of the details required by, or complying with, the Veterans' Preference Act, Title 5, U.S.C.A. § 851 et seq. The termination date was subsequently extended to December 6, 1949.

9. Plaintiff was thereupon directed by the Department of the Army to return to the United States. He followed this command and arrived in the United States on December 6, 1949.

10. The Board of Review, subsequent to the transfer of functions of September 21, 1949 (Paragraph 6, supra) continued in existence until December 31, 1949. On December 28, 1949 the High Commissioner reorganized the Board of Review and set up a successor Court of Restitution Appeals to continue the work previously performed by, and to take over all proceedings pending before, the Board of Review as of January 1, 1950.

11. Subsequent to February 9, 1950, plaintiff for the first time received a purported statement of reasons for the termination of his employment as of December 6, 1949, to wit, "Reduction in Force—Termination" by reason of "Liquidation of OMGUS". No further reasons were given and said reasons were palpably insufficient and invalid.

12. To the extent that the Veterans' Preference Act required the plaintiff to proceed administratively before the Civil Service Commission, plaintiff exhausted these remedies promptly and successfully. Attached are two orders of the Civil Service Commission dated July 1, 1952 and May 4, 1953, finding that there had been violations of plaintiff's rights under the Veterans' Preference Act and directing the Secretary of State to reinstate plaintiff to his position.

13. The Secretary of State has ignored these orders and has refused plaintiff any relief and continues to
4 refuse so to do, in spite of the plain mandate of the

aforesaid provision of the Veterans' Preference Act. The duty of defendant to comply with the Veterans' Preference Act is purely ministerial and involves the exercise of no discretion nor the interpretation of any law or regulation.

WHEREFORE, Plaintiff demands judgment directing defendant to comply with the Veterans' Preference Act and to restore plaintiff forthwith to active duty in the Department of State, in a position of like status and pay to that of member of the Board of Review, retroactively to December 7, 1949. Plaintiff also demands such other and further relief as to this Court may seem just and proper.

PHILIP W. AMRAM,
607 Ring Building,
Washington 6, D. C.
Attorney for Plaintiff.

5

EXHIBIT A

Filed April 5, 1954, Harry M. Hull, Clerk.

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

July 1, 1952.

Mr. P. F. Szluk, Personnel Officer
German Affairs Branch
Room 616, State Annex 12
Department of State
Washington, D. C.

Dear Mr. Szluk:

Reference is made to previous correspondence the Commission has had with Mr. Jack B. Tate, Deputy Legal Adviser, and Mr. Benedict English, Acting Deputy Legal Adviser, relative to the reduction in force appeals of Messrs. Horace J. Feldman and Meyer L. Casman in which the ques-

tion has been raised as to whether or not there was an actual transfer of functions to the Department of State from the Department of the Army when the Office of the Military Government in Germany was liquidated and the Office of the United States High Commissioner for Germany was established.

Mr. Feldman, a veteran, was employed in an excepted GS-9 position as a Clerk, in the United States Military Government Court (Tenth Judicial District), Ansback, Germany, and Mr. Casman was employed in an excepted GS-15 position as Judge, OMGUS, Board of Review, Nurnberg, Germany, by the Department of the Army as part of the courts system which now operates under a High Commissioner under the Department of State when they were issued their separation notices terminating their employment with the Department of the Army in 1949. They appealed their separations and the question presented is whether there was a transfer of functions from the Department of the Army to the Department of State, and if so, the last proviso in Section 12 of the Veterans' Preference Act of 1944 applies, which reads as follows: "and provided further, that when any or all of the functions of an agency are transferred to, or when an agency is replaced by some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

The Commissioners, after carefully considering all the facts relative to the separation of Messrs. Feldman and Casman, including those presented in connection with the hearing held before the Commission on March 12, 1952, have arrived at the conclusion that the functions of the courts under the Military Government were transferred to the Department of State or the Military Government insofar as the functions of the courts were concerned

were replaced by the Department of State on September 21, 1949 within the purview of Section 12 of the Veterans' Preference Act of 1944. Consequently, the last provision of Section 12 of that Act is applicable to these cases and Messrs. Feldman and Casman should have been transferred to the Department of State along with the functions of the court. Since they were not their separations have been disapproved by the Commission and corrective action, therefore, is required.

In view of the foregoing facts it is recommended by the Commission that Messrs. Feldman and Casman be restored to active Duty retroactively to the day following the last day in a full pay status and in a position of like status and pay in your Department to that from which they were improperly separated in the Department of the Army.

It is requested your Department advise the Commission within ten days of receipt of this letter of the corrective action taken or proposed to be taken by your department on behalf of Messrs. Feldman and Casman.

By direction of the Commission:

Sincerely yours,

JAMES W. MCBEE, *Acting Chairman*
Board of Appeals and Review.

7

EXHIBIT B

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

May 4, 1953.

Honorable John Foster Dulles,
The Secretary of State.

Dear Secretary Dulles:

Reference is made to the letter of December 22, 1953, file L/A, from Mr. Carlisle H. Humelsine, Deputy Under Secretary, Department of State, to the Honorable Robert Ramspeck, former Chairman of the Civil Service Commission, in which it is stated that the Department of State must respectfully decline to comply with the Commission's

recommendation of July 1, 1952, which was renewed on December 5, 1952, that Messrs. Horace J. Feldman and Meyer L. Casman be restored to active duty retroactively to the date following the last day in a full pay status to positions of status and pay in the Department of State equal to those from which they were improperly separated in the Department of the Army. These recommendations were made as a result of their successful appeal to the Civil Service Commission from separation by reduction in force.

The Commission has made a further study of the cases of Messrs. Feldman and Casman, taking into consideration the arguments advanced by the Department of State in the letter of December 22, 1952, as to the reasons it must decline to comply with the Commission's recommendation in these two cases. As a result of this further study the Commission has reached the conclusion that the transfer of the court system from the Department of the Army to the Department of State was a transfer of functions within the meaning of Section 12 of the Veterans' Preference Act of 1944, as amended; that Section 12 of that Act is applicable to this class of employees of the State Department; and that the Foreign Service Act of 1946 and other legislation referred to by Mr. Humelsine cannot be regarded as showing an intent by Congress to make Section 12 of the Veterans' Preference Act inapplicable to these positions in the Department of State.

8 With regard to the statement made by Mr. Humelsine that it is not believed that the Department of State can in good conscience pay a sum in the neighborhood of \$40,000 or \$50,000 to individuals who were never employed by the Foreign Service for which the Commission has recommended payment, I would like to call your attention to the fact that in the latter part of July, 1949, a representative of the legal division of the Department of State presented informally to the Commission's Chief Law Officer certain questions relating to the taking over by the Department of State of the functions of the Military Government. These questions had to do with the applicability

of Section 12 of the Veterans' Preference Act. The representative of the Legal Division of the Department of State was advised at that time that there was a transfer of functions, and that Section 12 of the Veterans' Preference Act of 1944 would be applicable. Hence the Department of State was on notice that Messrs. Feldman and Casman were entitled to be transferred to the State Department, and the present payment of large sums to these men could have been avoided had the Department acted on the advice then furnished it by the Commission.

In this connection I should call to your attention the provision of law that from any "back pay" which may be due an employee restored as a result of an appeal there must be deducted any amounts which he had earned in the interim from any employment. Assuming that these men have not been idle pending action on their appeal, it is probable that the amount payable to them will be much less than feared by Mr. Humelsine.

I should also mention that under the Veterans' Preference Act of 1944, as amended, it is mandatory for agencies of the Government to put into effect the Commission's recommendations pursuant to appeals under that Act.

It is requested that the Commission be advised not later than fifteen days from the date of this letter of the date that Messrs. Feldman and Casman are restored to duty in the Department of State.

Sincerely yours,

PHILIP YOUNG,
Chairman.

* * * * *

9 Filed June 18, 1954. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF

v.

JOHN FOSTER DULLES, SECRETARY OF STATE, DEFENDANT

ANSWER

First Defense

The complaint fails to state a claim against the defendant upon which relief may be granted.

Second Defense

Answering the numbered paragraphs of the complaint specifically, defendant avers:

1. Admitted, except that defendant is not required to answer the jurisdictional allegations of paragraph 1.

2. Admitted.

3. On information and belief, defendant admits that plaintiff was appointed as an attorney, P-6, Office of General Counsel, Nürnberg, Germany, effective May 26, 1947; avers that plaintiff was promoted to the position of Judge (Leg-245), P-7, Legal Division OMGUS, Berlin, Germany, on January 13, 1948, and was transferred from Berlin, Germany to Stuttgart, Germany on July 25, 1948; that plaintiff was promoted to the position of judge, P-8, Property Division, OMGUS, Nürnberg, Germany, effective December 12, 1948. Defendant denies that plaintiff maintained an efficiency rating of "excellent" during the entire time of his employment. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 3.

10 4. Admitted.

5. Admitted, except that defendant denies that the occupation statute was enacted pursuant to Executive Order 10062, or that it transferred all powers and responsibilities of OMGUS to the United States High Commissioner for Germany.

6. Denied, except that defendant avers that on September 21, 1949 the Office of the High Commissioner was established under the jurisdiction of the Secretary of State.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, but avers that the Board of Review continued to exist as an organ of OMGUS for purposes of liquidation until it was abolished in December of 1949.

8. Denied, except that on information and belief defendant avers that during the liquidation of the Office of the Military Government of the United States, plaintiff received a notice, dated October 3, 1949, terminating his active-duty status as of November 3, 1949; that plaintiff was carried in a duty status until November 22, 1949 and was carried in travel status from that date through December 6, 1949.

9. On information and belief, defendant admits that plaintiff was thereafter given travel orders and arrived in the United States on December 6, 1949.

10. Denied, except that defendant admits that the Board of Review technically remained in existence for purposes of liquidation through the month of December, 1949.

11. Defendant avers that upon receipt of the notice dated October 3, 1949, plaintiff was at all times aware that his termination was the result of a reduction-in-force due to the liquidation of OMGUS.

12. Defendant admits that plaintiff appealed his reduction in force by the Department of the Army to the United States Civil Service Commission. Defendant avers that the Civil Service Commission had no jurisdiction to hear plaintiff's appeal insofar as the Department of State was concerned. Defendant further avers that on October 5, 1951, the Commission made a final determination that "the

employing agency did not violate any of the retention preference rights" of plaintiff in effecting his separation, but that some time thereafter, without notice to the Department of State, the Commission reopened the case and on July 1, 1952, held that plaintiff should be "restored" to a position in the Department of State.

13. Defendant admits that he has respectfully declined to comply with the recommendation of the Civil Service Commission. Defendant denies that he has refused to exercise a statutory duty or that he has failed to perform a ministerial action which he is legally required to perform.

Third Defense

The Civil Service Commission was without authority to order plaintiff's restoration to a position in the Department of State of like status with the position he previously held with the Department of the Army for the reason that the Department of State and the Foreign Service are not synonymous terms and there exists no position in the Department of State of like status to the position of member of the Board of Review, and for the further reason that the Commission's regulations, even if they apply, do not afford plaintiff preference in retention over employees in legal positions in the Department of State in Washington, D. C.

Fourth Defense

The Civil Service Commission was without authority to order the Secretary of State to appoint plaintiff to a position in the Foreign Service of like status with the position he previously held with the Department of the Army for the reason that Section 12 of the Veterans Preference Act does not apply to the Foreign Service of the United States.

Fifth Defense

Plaintiff is not entitled to recover for the reason that there was no transfer of functions, in fact or in law, from the Office of the Military Government of the United States to the Office of the High Commissioner of Germany, or from the Department of the Army to the Department of State, within the meaning of Section 12 of the Veterans Preference Act.

12 WHEREFORE, defendant demands judgment together with the costs of this suit.

LEO A. ROVER,
United States Attorney.

OLIVER GASCH,
Assistant United States Attorney.

FRANK H. STRICKLER,
Assistant United States Attorney.

CATHERINE B. KELLY,
Assistant United States Attorney.

* * * * *

13 Filed December 13, 1954, Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF,

v.

JOHN FOSTER DULLES, Secretary of State, DEFENDANT

Motion for Summary Judgment by Plaintiff

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

2. If summary judgment is not rendered in the plaintiff's favor for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what facts are actually and in good faith controverted, thereupon making an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

The reasons for this motion are:

(a) All the basic, relevant facts pleaded in the complaint are admitted.

(b) The only defenses pleaded are defenses of law, to wit:

14 (1) The Veterans' Preference Act is wholly inapplicable to members of the Foreign Service Staff.

(2) There was no transfer of functions.

(3) The Department of State and the Foreign Service are wholly separate and disconnected Government departments.

(c) These grounds are more particularly set forth in the Memorandum of Points and Authorities filed simultaneously herewith.

PHILIP W. AMRAM,
607 Ring Building,
Washington 6, D. C.,
Attorney for Plaintiff.

December 13, 1954.

* * * * *

Article 69, Military Government Law 59, issued by the Office of Military Government in Germany, United States Area of Control, on November 28, 1947 (12 FR 7990):

“Board of Review

“A Board of Review shall have the power *to review any decision on any claim for restitution under this Law and to take whatever action is deemed necessary with respect thereto.** Regulations to be issued by Military Government will provide for the appointment and composition of the Board, its jurisdiction, procedure, and such other matters as are deemed appropriate.”

Article 1 of Law No. 2 issued by the Office of United States High Commissioner for Germany, on December 28, 1949 (15 FR 1547):

“Article 69 of United States Military Government Law No. 59, Restitution of Identifiable Property, is hereby amended to read as follows:

ARTICLE 69

Court of Restitution Appeals

“The United States Courts of the Allied High Commission for Germany shall have jurisdiction *to review any decision on any claim for restitution under this law and to take any action which they shall deem necessary or proper in respect thereof.** The United States High Commissioner for Germany may provide by regulation for the establishment of a standing panel of the United States Courts of the Allied High Com-

* Emphasis is supplied to show the absolute identity of the functions of the original Board of Review and the successor Court of Restitution Appeals.

mission for Germany to exercise such jurisdiction as a court of restitution appeals. Such regulations shall provide for the jurisdiction and procedure of such court and for such other matters as are deemed appropriate."

Article 6 of Regulation No. 7, issued by the Office of the United States High Commissioner for Germany, on December 28, 1949 (15 FR 1548):

"Transitional Provisions

"*All proceedings pending before the Board of Review* on the effective date of this Regulation as amended and all decisions and actions made or taken by said Board in the due exercise of its jurisdiction and powers *shall be deemed proceedings before and decisions and actions of the Court of Restitution Appeals.*"* Said Court in the interest of justice shall permit such proceedings to go forward from the stage at which such proceedings became subject to its jurisdiction or from any earlier stage and may take any action in the premises which it may deem appropriate to protect the interests of the parties thereto; provided, however, that the Court of Restitution Appeals shall not review or reverse final decisions of the Board of Review."

* Emphasis is supplied to show the specific intent to "transfer" the functions.

21 Filed January 19, 1955, Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF,

v.

JOHN FOSTER DULLES, Secretary of State, DEFENDANT

Cross-Motion for Summary Judgment

Comes now defendant by his attorney, the United States Attorney, and moves this Honorable Court for summary judgment herein for the reason that there exists no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Exhibits A (A-1 through A-12), B (B-1 through B-11), C-1 and C-2, D, E, F, (F-1 through F-12), G, H and I are attached hereto and made a part of this motion.

LEO A. ROVER,
United States Attorney.

OLIVER GASCH,
Assistant United States Attorney.

FRANK H. STRICKLER,
Assistant United States Attorney.

CATHERINE B. KELLY,
Assistant United States Attorney.

* * * * *

23 Filed June 30, 1955. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF

v.

JOHN FOSTER DULLES, Secretary of State, DEFENDANT

Pretrial Stipulation

It is stipulated by the parties as follows:

1. Plaintiff, a graduate of West Point Military Academy and the University of Pennsylvania Law School, is an honorably discharged veteran of World War I and a member in good standing of the Bar of Philadelphia, Pennsylvania since 1926.

2. On May 21, 1947, plaintiff was given an Excepted Schedule A Appointment as attorney (Grade P-6) in the War Department and was assigned to the Office of Chief of Counsel, Nurnberg, Germany, Office of the Military Government of the United States (OMGUS). (Exhibit A-1).

3. On November 10, 1947, while plaintiff was so employed, Military Government Law 59 governing the restitution of identifiable property was promulgated. Article 69 thereof provided for a Board of Review. (Exhibit B-1).

4. On January 13, 1948, plaintiff was appointed to the position of Judge (Leg/245) in the Legal Division of OMGUS at the grade of P-944-7 and assigned to duty in Berlin. On July 25, 1948, his duty station was changed from Berlin to Stuttgart. (Exhibit A-2 and A-3).

24 5. On August 10, 1948, by Regulation 4, a Board of Review was established under Article 69, Military Government Law 59. (Ex. B-2).

6. On November 3, 1948, plaintiff was designated a Member of the Board of Review. (Exhibit A-11).

7. On November 26, 1948, plaintiff was given a service grade promotion in the Property Division of OMGUS to grade of P-8 with a base compensation of \$10,330 per annum, including European differential, and his duty station was changed from Stuttgart to Nurnberg. (Exhibits A-4 and A-5).

8. Shortly thereafter, plaintiff was reclassified GS-15, and his base compensation was fixed at \$10,500 plus 10% foreign differential.

9. During plaintiff's service with OMGUS, his efficiency ratings were mostly "Excellent" and otherwise "Very Good". Exhibits A-7 and A-8. His service was under employment agreements dated April 2, 1947 and April 19, 1949. Exhibits A-9 and A-10.

10. On May 12, 1949, the Occupation Statute was promulgated. Exhibit E, pp. 56, 57.

11. On June 6, 1949, the President of the United States issued Executive Order 10062 establishing the position of the United States High Commissioner for Germany (HICOG). Exhibit E, p. 51.

12. On June 16, 1949, the duly authorized representatives of the United States, Great Britain and France proclaimed the Charter of the Allied High Commission for Germany. Exhibit E, pp. 58-67.

13. On August 13, 1949, OMGUS promulgated its General Order No. 38 placing OMGUS in liquidation status effective August 15, 1949. (Referred to in Exhibit A-12).

14. On September 21, 1949, the Council of the Allied High Commission declared the Occupation Statute to be in force. Exhibit B-3.

15. Simultaneously therewith, on September 21, 1949, the Office of the United States High Commissioner for Germany (HICOG) was established. Exhibits C-1 and C-2, H.

16. On October 3, 1949, the Headquarters, Frankfurt Military Post, United States Army, issued notice to plain-

tiff notifying him that his active duty status would be terminated November 3, 1949. Said date was subsequently extended to December 6, 1949. Exhibits A-12, A-6.

17. Plaintiff arrived in the United States on December 6, 1949.

18. On December 28, 1949, the United States High Commissioner for Germany promulgated Law No. 2, being Amendment No. 3 to Military Government Law 59. Concurrently, and in conformity with Law No. 2, the High Commissioner issued Regulation No. 7 under Military Government Law No. 59, amending Regulation No. 4. Exhibit B-4.

19. The plaintiff was never employed by HICOG.

20. Exhibits B-5 through B-11 are correct photostatic copies of orders and decrees dealing with the United States Courts of the Allied High Commission.

21. Plaintiff instituted administrative action, alleging wrongful discharge and violation of his rights under Section 12 of the Veterans Preference Act. Under date of October 5, 1951 the Civil Service Commission made a decision that none of plaintiff's rights had been violated. Exhibit F-5. Under date of July 1, 1952, the Commission reversed its decision, and recommended that plaintiff be "restored to active duty retroactively to the day following the last day in a full pay status and in a position of like status and pay in [the Department of State] to that from which [he was] improperly separated in the Department of the Army." Exhibits A and B to plaintiff's complaint.

22. The Department of State has declined to comply with the recommendation of the Civil Service Commission.

23. Official government records, and Exhibits numbered A-1 through A-12, B-1 through B-11, C-1 and C-2, D, E, F-1 through F-12, G, H, and I, (filed herein with defendant's cross-motion for summary judgment), and plaintiff's exhibits A and B attached to his complaint, may be admitted in evidence as genuine documents subject to the

usual objections of competency, materiality and relevancy.
Dated: March 18, 1955.

PHILIP W. AMRAM,
Attorney for Plaintiff.

CATHERINE B. KELLY,
Assistant United States Attorney.

26 Filed March 31, 1955. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF,

v.

JOHN FOSTER DULLES, DEFENDANT

Order

Upon consideration of plaintiff's motion for summary judgment, defendant's cross-motion for summary judgment, the pleadings, stipulation and exhibits thereto, after hearing oral argument of counsel, and it appearing to the Court that the provisions of the Veterans' Preference Act apply to the Foreign Service of the United States; that there was a transfer of functions from the Board of Review, Office of the Military Government of the United States to the Court of Restitution Appeals, Office of the High Commissioner of Germany; that plaintiff was denied his right to preferential transfer under Section 12 of the Veterans' Preference Act; that plaintiff has properly exhausted all his administrative remedies before the Civil Service Commission; and that the recommendation contained in the Civil Service Commission's letters of July 1, 1952 and May 4, 1953 to the Department of State is valid, it is by the Court this 30 day of March, 1955,

ORDERED, that plaintiff's motion for summary judgment be and the same is hereby granted and defendant's cross-motion for summary judgment be and the same is hereby denied, and it is

27 FURTHER ORDERED, that the plaintiff is entitled to restoration and reinstatement retroactively to the commencement of business December 7, 1949, to duty as Judge of the Board of Review, Office of the Military Government of the United States (December 7th to 31st, 1949) and as Judge of the Court of Restitution Appeals, Office of the High Commissioner of Germany (from and after January 1, 1950), and it is

FURTHER ORDERED, that jurisdiction of the cause is retained if defendant fails to reinstate and restore plaintiff to his position, further proceedings, including the issuance of an order in the nature of a mandamus, may be had.

ALEXANDER HOLTZOFF,
Judge.

28 Filed April 8, 1955. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1421-54

MEYER L. CASMAN, PLAINTIFF,

v.

JOHN FOSTER DULLES, Secretary of State, DEFENDANT

Opinion

Philip W. Amram, Esq., of Washington, D. C., for the plaintiff.

Catherine B. Kelly, Esq., Assistant United States Attorney, of Washington, D. C., for the defendant.

This case comes before the Court on cross motions for summary judgment. The action is brought to secure reinstatement to a Government position, the plaintiff claiming he is entitled to reinstatement by virtue of the provisions of the Veterans' Preference Act.

The plaintiff at the time of his separation from the Government service was employed as a judge in the legal division of the Office of Military Government of the United States in Germany. That office was, as its name indicates, under the War Department and constituted a part of the military establishment of the United States. The jurisdiction of the court or board, of which the plaintiff was a

29 member, was to review decisions on claims for restitution of property. In due course when some of the functions of the military government were transferred to the civil government the Board of Review was abolished, and a Court of Restitution Appeals was established under the Office of the High Commissioner, who was the principal civilian officer of the United States located in Germany. The function which the plaintiff had been performing as a member of the Board of Review now devolved upon the new agency known as the "Court of Restitution Appeals" which was established in a different department of the Government, namely, the Department of State.

The plaintiff was not continued in the service by the new agency and in this action seeks reinstatement by the Secretary of State and a judgment for back pay. Before bringing this action, however, he took an administrative appeal to the Civil Service Commission against the action of the Secretary of State in refusing to re-employ him or to continue his employment. The Civil Service Commission decided the matter in favor of the plaintiff and directed the reinstatement of the plaintiff. The Chairman of the Civil Service Commission, in his communication to the Department of State, dated May 4, 1953, called attention to the fact that under the Veterans' Preference Act it was mandatory for agencies of the Government to put into effect the Commission's recommendations pursuant to appeals under

that Act. The State Department declined to comply with the direction of the Civil Service Commission and this suit followed.

The Veterans' Preference Act, 5 U.S.C.A. 851, provides that in certification for appointment and re-employment and in retention of civilian positions of the Government, certain preferences shall be extended to veterans. It is provided that the Act shall extend to the classified civil service, the unclassified civil service, temporary or emergency establishments, and to the civil service of the District of Columbia. Obviously the plaintiff at the time of his separation from the service was in the unclassified civil service, and was within the scope of the Act unless there is some other statute that would detract from that conclusion. The Act, 5 U.S.C.A. 861, expressly provides that in the event of transfer of function from one agency to another an employee entitled to Veterans' Preference shall be transferred to the new agency and retained in the service in preference to persons not having veterans' preference.

It is not disputed that this plaintiff is entitled to a veteran's preference. It is argued, however, that the Veterans' Preference Act does not apply to the Foreign Service of the United States and has been repealed pro tanto by the Act creating the Foreign Service, 22 U.S.C.A. 801 *et seq.*, which was enacted subsequently to the effective date of the Veterans' Preference Act. Admittedly there is no express repeal provision in the Foreign Service Act. Repeals by implication, however, are not favored. It is a well recognized elementary principle of statutory construction that except in cases of clear repugnancy between an earlier and a later statute, the later statute will not be deemed to have repealed the former, but effect will be given to both if at all possible. This is that type of a situation. There is no clear repugnancy or inconsistency between the two statutes. That it may be undesirable to foist the limitations of the Veterans' Preference Act upon the Foreign Service and upon the discretion of the Secre-

tary of State is not a matter for the judiciary to consider. This is a question of policy for the Congress.

There is no doubt that there has been a transfer of function in this case to a new agency. The old agency was liquidated. A new agency was created within a different department of the Government to perform the same function. This situation is precisely within that provision of the Veterans' Preference Act which saves for a person entitled to that preference the right to be transferred to a new agency when a function is transferred from a prior agency to another establishment.

In view of these considerations, the Court is of the opinion that the plaintiff is entitled to relief and that the decision of the Civil Service Commission should be upheld.

Accordingly, the plaintiff's motion for summary judgment is granted and the defendant's cross motion is denied.

Counsel will submit a proposed form of judgment. At that time the Court will hear argument on the scope and nature of the relief to be granted.

_____,
United States District Judge.

March 22, 1955.

WAR DEPARTMENT
REPORT OF PERSONNEL ACTION
(FIELD)

COMPS OF ENGINEERS
U. S. ENGINEER DISTRICT
1400 PINE MUTUAL BLVD.
PHILADELPHIA, PA.

May 21, 1947

FILED
JAN 10 1955

2. TO: **MYER** **CARRAN** 3. S. S. NO.

4. THROUGH: **Commander-in-Chief, Personnel Branch**

This is to notify you of the following action concerning your employment, which is subject to the provisions on the reverse hereof. This form is an official record of your service history in the War Department and should be retained for future reference.

5. NATURE OF ACTION (Use standard terminology)

Excepted Appointment

6. EFFECTIVE DATE

May 26, 1947

7. POSITION TITLE

(FROM)

(TO)

Attorney

**P-6, \$3577.75 per annum
40 hours per week**

Office Chief of Counsel

Munich, Germany

8. SERVICE GRADE AND SALARY

9. FORCE AND SERVICE FOR COMMAND

10. INSTALLATION AND LOCATION

11. ORGANIZATION UNIT

12. DUTY STATION AND LOCATION

13. REMARKS

**\$7102.20 Base Pay Rate
1775.55 Differential (Effective on date of departure from U. S.)
\$3577.75 Total Basic Compensation for 40 hour week**

345 - Requisition No.

Employment is subject to "Conditions of Employment" and regulations in effect in the overseas command.

Affidavit "Striking Against the Government" occurred 5/21/47

Age Limitations have been waived by Office, Secretary of War

For the Commanding Officer:

M. E. COMPTON
Chief, Personnel Branch

WD FORM 1 MAY 46 50

201 FILE

A-1

14. Civil Service Report Series Temp.	15. Date of Birth
16. Civil Service or Other Leg. Authority	17. Appropriation or Fund Authority
18. Male	19. Non Veteran
20. Civil Service Retirement	21. Position Reference or Job Description Manual Number
22. White	23. Date of Oath

4/9/55
Schedule A-1-7
OSG Rules & Reg.
May 26, 1947
Male
Non Veteran
Civil Service Retirement
Position Reference or Job Description Manual Number
White
5/21/47

STANDARD FORM 50
UNIT TATES
CIVIL SERVICE COMMISSION
OCTOBER 1946

FORM APPROVED
BUREAU BUREAU NO. 10-0000

WAR DEPARTMENT

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR.—MRS.—FIRST—MIDDLE INITIAL—LAST) Mr. Meyer I. Castner	2. DATE OF BIRTH 4-9-1895	3. JOURNAL OR ACTION NO.	4. DATE Jan. 13, 1948
--	------------------------------	--------------------------	--------------------------

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY) Intra Agency Transfer Promotion	6. EFFECTIVE DATE Jan. 13, 1948	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY Ltr. Vincour dtd 8-1-47 Ltr. Vincour dtd 9-20-47 A-1-7
---	------------------------------------	---

FROM		TO	
Attorney	8. POSITION TITLE	Judge (Leg/245)	
P-6, 1987.75 p.a.	9. SERVICE GRADE, SALARY	P-944-7, 210,000.00 p.a.	
Office Chief of Counsel for War Crimes, 1 396	10. ORGANIZATIONAL DESIGNATIONS	Legal Division	
Murnberg, Germany	11. HEADQUARTERS	OWC, APO 742, S.C.	
☒ FIELD ☐ DEPARTMENTAL	12. FIELD OR DEPT'L	☒ FIELD ☐ DEPARTMENTAL	

13. REMARKS
1517.50 base salary
1320.50 differential
2838.00 maximum allowed under Public Law 106, 1945.

Employment subject to "Conditions of Employment" and regulations governing civilian personnel in the overseas command. Affidavit has been executed in compliance with CPC 73 dated 9 July 1945.

For the Commanding Officer:

End
ELITH M. MOUS
Acting Chief,
Status & Statistics Section

14. SIGNATURE OR OTHER AUTHENTICATION

15. VETERAN'S PREFERENCE				16. POSITION CLASSIFICATION ACTION			
HOME	S PT.	10 POINT	WITH	WVR	OTHER	NEW	VICE
		DEBIL WIFE WIDOW					
17. SEX	18. RACE	19. APPROPRIATION		20. SUBJECT TO C. S. RETIREMENT ACT		21. DATE OF OATH (ACCESSIONS ONLY)	
		FROM:					
		TO:					
				22. LEGAL RESIDENCE			

U. S. GOVERNMENT PRINTING OFFICE

201 file

W. D. Form No. 50
(Revised 12-1-44)WAF DEPARTMENT
NOTIFICATION OF PERSONNEL ACTION
(FIELD)

CHS, APO 742

1. Date: 24 July 1948

2. TO: James L Garrett 3. S. S. NO. _____
First Name Middle Initial Last Name4. THROUGH: Legal Division

Office in which Employed or to be Employed

This is to notify you of the following action concerning your employment. This action is subject to the provisions on the reverse hereof:

5. NATURE OF ACTION (Use standard terminology)

Intra Agency Transfer

6. EFFECTIVE DATE

July 25, 1948

7. POSITION TITLE	(FROM)	(TO)
8. SERVICE GRADE AND SALARY		
9. FORCE AND SERVICE OR COMMAND		
10. INSTALLATION & LOCATION		
11. ORGANIZATION UNIT		
12. DUTY STATION & LOCATION		

Judge (Leg/245)

Same

P-944-7, \$10,330.00 p.a.

Same

L.C.

Same

CHS, APO 742

Same

Legal Division

Same

Berlin, Germany

Suttgart, Germany

13. REMARKS: \$4809.30 Base salary
1800.00 Differential
\$6609.30 Maximum allowed under salary of 1948

Pay scale rate increased by salary rate of 1948 effective 11 July 1948.

This instrument is prepared for purpose of changing the employee's duty station. Pay and leave will be administered by CHS for Wuerstemberg-Baden, APO 154.

For the Commanding Officer:

E. M. D. D. D. D.
Chief

Status & Statistics Sec, GPO

201 FILE

14. Civil Service Report Status (Temp.)	(Perm.)	
15. Date of Birth	1-9-1915	
16. Civil Service or Other Legal Authority	LAR CHS 9-25-47 LAR CHS 9-25-47	
17. Approval or Fiscal Authority		
18. Male	Female	
19. Non Veteran	VETERAN	
20. Civil Service Retirement	Yes No	
21. Pay Rate	Yes No	
22. White	Negro	Other
23. Position Reference or Job Description Manual Number		
24. Date of oath (Accession Action Only)		

WAR DEPARTMENT
NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR. MRS. FIRST MIDDLE INITIAL LAST)		2. DATE OF BIRTH	3. JOURNAL OR ACTION No.	4. DATE
Mr. Meyer L. Gussman		Apr 9, 1945		Nov 26, 1946
This is to certify you of the following action affecting your employment				
5. NATURE OF ACTION (USE STANDARD TERMINOLOGY)		6. EFFECTIVE DATE	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY	
Intra-agency Transfer & Promotion		Nov 26, 1946	WD Ordinance C, 1946	
FROM		TO		
Judge (Lsg/245) P-944-7, \$10,350.00 p.a. I.C., ORDUS, APO 757 Legal Division Stuttgart, Germany		Judge P-970-8, \$10,350.00 p.a. I.C., ORDUS, APO 757 Registry Division Wiesbaden, Germany		
☒ FIELD ☐ DEPARTMENTAL		☒ FIELD ☐ DEPARTMENTAL		
12. REMARKS				
\$10,305.00 Base pay rate 25.00 Differential \$10,330.00 Total maximum allowed under Public Law 106, 1945				
Attached for administrative purposes to Office of Secretary General for Courts Administration.				
15. VETERAN PREFERENCE NONE 5 PT. 10 POINT WWI WWI OTHER Disch. Wife Widow				
16. POSITION CLASSIFICATION ACTION NEW VICE I. A. REAL				
17. SEX 18. RACE 19. APPROPRIATION 20. SUBJECT TO C. S. RETIREMENT ACT (YES-NO) 21. DATE OF OATH (ACCESSIONS ONLY) 22. LEGAL RESIDENCE				
M U FROM: TO:				

4. PERSONNEL FOLDER COPY

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 - 725700

STANDARD FORM 50 (4 PART)
UNITED STATES
CIVIL SERVICE COMMISSION
OCTOBER 1948

OMCUS LIQUIDATION OFFICER APO 757
DEPARTMENT OF THE ARMY

FORM APPROVED BY
BUDGET BUREAU NO. 15-7084

NOTIFICATION OF PERSONNEL ACTION

1 NAME (MR - MISS - MRS FIRST MIDDLE INITIAL LAST) Mr. Meyer L. Casman		2 DATE OF BIRTH Apr 9, 1895	3 JOURNAL OR ACTION NO.	4 DATE Feb 9, 1950
This is to notify you of the following action affecting your employment:				
5 NATURE OF ACTION (USE STANDARD TERMINOLOGY) Reduction in Force - Termination		6 EFFECTIVE DATE Feb 6 Dec 49	7 CIVIL SERVICE OR OTHER LEGAL AUTHORITY CPR 21	
FROM Judge PD-441-2 GS-970-15, \$10,500.00 base p/r (E.C.), OMCUS, Property Division, Furnberg, Germany APC 696-A European Command		8 POSITION TITLE	TO	
		9 SERVICE GRADE, SALARY		
		10 ORGANIZATIONAL DESIGNATIONS		
		11 HEADQUARTERS		
☒ FIELD ☐ DEPARTMENTAL		12 FIELD OR DEPT'L	☐ FIELD ☐ DEPARTMENTAL	
13 REMARKS Eligible for foreign post differential at rate of 10% of statutory salary. Termination resulting from total liquidation of OMCUS pursuant to OMCUS General Order No. 38, 15 August 1949. Per annum rate adjusted in accordance with Classification Act of 1949, effective 30 October 1949. FORWARDING ADDRESS: 7512 Street, Martins Lane Philadelphia 16, Penna. SALLY A. CHAPIN CHIEF ADMIN 14 SIGNATURE OR OTHER AUTHENTICATION				
15 VETERAN'S PREFERENCE		16 POSITION CLASSIFICATION ACTION		
HOME	SPT	NEW VICE I A REAL		
	18 POINT			
	DEAD WIFE WIDOW			
	OTHER			
	Non-Veteran			
17 SEX M	18 RACE W	19 APPROPRIATION FROM 2102700.002 P 411-01 TO		20 SUBJECT TO C. S. RETIREMENT ACT (YES-NO) Yes
		21 DATE OF OATH (ACCESSIONS ONLY) 14 JUL 1950		22 LEGAL RESIDENCE

4. PERSONNEL FOLDER COPY

U. S. GOVERNMENT PRINTING OFFICE: 1948 783384

46 Filed January 19, 1955. Harry M. Hull, Clerk

Employment Agreement

1. Except as otherwise specified below, United States continental citizens are employed under the same laws and regulations as apply to Federal employees within the United States, and are subject to the provisions of statutes or regulations of the War Department and of this command relating to United States Government positions, personnel, property, or funds.

2. This appointment is an excepted appointment under Schedules A or B of the United States Civil Service Act and Rules unless otherwise specified on the WD Form 50, Notification of Personnel Action.

3. Your appointment is of indefinite tenure. You are required to remain in service with this command at *least 2 years* from the time of arrival at permanent duty station, except where otherwise noted on the face of the WD Form 50, in order to be entitled to return transportation to your point of hire at Government expense, unless you are separated sooner for reasons acceptable to the Government not involving misconduct. The particular employing unit, the location of the work, and the advisability of any transfer within the command will be in the sole discretion of this command.

4. The basic rate is paid for a 5-day, 40 hour week, which is standard for pay and leave purposes. For work authorized in excess of the hours required by law, overtime compensation will be paid in accordance with existing United States statutes.

5. While in an official travel status, including time en route to and from the place of engagement, you will be in pay status during the time established by this command as the regularly scheduled workweek. No pay is authorized for time spent in official travel during any calendar week in excess of this period, except that hourly and per diem employees will be compensated at straight-time rates for time in travel status on nonwork days.

6. Annual and sick leave credits and charges, retirement deductions, and treatment and compensation for service-

connected injuries or death will be handled pursuant to Federal law and War Department regulations.

7. Quarters and subsistence are presently made available by this command. Charges, according to the kind made available, will be based on Civilian Personnel Regulations 125, except as otherwise authorized by the Civilian Personnel Division, Office of the Secretary of War.

8. Necessary medical care and hospitalization will be provided by the employing command pursuant to existing Army Regulations. Such service will not be furnished in United States territories and possessions if adequate private medical facilities are available.

9. You are subject to military law wherever it is established by competent authority. Whenever required, prescribed uniforms must be worn and are to be procured at your expense, as are all other items of clothing.

10. Under present Army Regulations, you are privileged to make purchases at quartermaster sales stores and outlets of the Army Exchange Service, except when restricted by command regulations.

11. You are being employed with the understanding that, to the best of your knowledge and belief, you are qualified on the basis of physical condition, character, and training.

12. It is understood that you have read and understand the foregoing statement, as well as the fact that NO OTHER REPRESENTATIONS CAN CHANGE YOUR STATUS OR BIND THE UNITED STATES ARMY OR GOVERNMENT.

MEYER L. CASMAN.

2 April 1947.

A-10

47 Filed January 19, 1955. Harry M. Hull, Clerk

26 April 1948

CPR 150.2 C4

* * * * *

Employment Agreement

1. Generally, United States continental citizens employed for duty in overseas areas are subject to the same laws

and regulations applicable to Federal employees within the United States, including both current and future regulations issued by the Department of the Army, Department of the Air Force, or subordinate commands, concerning Government positions, personnel, property, and funds. However, there are certain specific provisions particularly applicable to employees going overseas which are detailed below.

2. This is an excepted appointment of indefinite tenure under Schedule A or B of the Civil Service rules, and does not confer competitive status within the Federal Civil Service, unless otherwise specified on the Standard Form 50, Notification of Personnel Action.

3. Unless separated at an earlier date for the convenience of the Government in accordance with applicable regulations, you are required to remain in service with the command at least 24 months from time of arrival at permanent duty station in order to be authorized return transportation to your place of residence at Government expense. If, at any time during the agreed minimum period of service, you return to the United States for reasons not acceptable to the Government, you will be required to pay the cost of your return travel. If such return is within the first year of service, you will also be required to reimburse the Government for the entire cost of your transportation to the oversea command. Should you be separated at any time prior to the completion of the agreed minimum period of service for reasons acceptable to the Government not involving misconduct, your return will be authorized at Government expense.

4. The exact locality in which stationed, the particular unit or group to which assigned, or the possibility of any transfer within the theater cannot be determined until your arrival in the oversea area, as they are matters solely within the discretion of the employing command.

5. The basic salary rate is paid for a 40-hour week, which is standard for pay and leave purposes. The 40 hours may consist of five 8-hour days, may be spread over 6 days, or other variations may be made according to the requirements of the local command. For work authorized in ex-

cess of 40 hours per week, overtime compensation will be paid in accordance with applicable laws.

6. While performing official travel, including time en route to and from the place of employment, you will be in a pay status during the hours established by the command as the regularly scheduled workweek.

7. Annual and sick leave credits and charges, retirement and tax deductions, and treatment and compensation for service-connected injuries or death will be handled pursuant to Federal law and Department of the Army and Department of the Air Force regulations.

8. Where subsistence and quarters are provided by the command, charges will be fixed in accordance with applicable civilian personnel regulations according to kind made available, except as otherwise authorized by proper authority. Types of quarters and subsistence available generally cannot be determined until arrival at the overseas station. Quarters and subsistence will be made available to you.

9. Necessary medical care and hospitalization will be provided by your employing command, while in the overseas area, pursuant to Army Regulations. Further medical care upon return to the United States is not authorized, except in certain emergency cases. Similarly, such services will not be furnished in United States territories and possessions if adequate private medical facilities are available.

10. You are subject to military law wherever it is established by competent authority.

11. Under present Army Regulations, you are privileged to make purchases at quartermaster sales stores and outlets of the Army Exchange Service, except when restricted by local command regulations.

12. Confirmation of your appointment is subject to verification of your experience and training record, satisfactory physical condition upon examination, and necessary character and loyalty investigation.

13. By your signature, you certify that you have read and understand this agreement and that no other promises or representations except those contained herein can change

or representations except those contained herein can change your status or bind the United States Government, the United States Army or the United States Air Force.

(S.) MEYER L. CASMAN.

19 April 1949

Interim Leave Agreement—Effective date will be posted upon employees return to E.C.

A-11

48 Filed January 19, 1955. Harry M. Hull, Clerk
Berlin, Germany
3 November 1948

SUBJECT: Designation of Member, Board of Review under
Military Government Law No. 59

To: Judge Meyer L. Casman

Effective 3 November 1948, by direction of the Military Governor, and in accordance with Regulation No. 4 under Military Government Law No. 59, dated 10 August 1948, entitled "Establishment of Board of Review", you are hereby designated Member of the Board of Review.

(S.) ERIC G. GRATION,
Acting Secretary General.

13 February 1950

I certify this to be a true and correct copy of the original of this letter.

MEYER L. CASMAN.

49 A-12

Filed January 19, 1955. Harry M. Hull, Clerk

HEADQUARTERS

Frankfurt Military Post

APO 757 US Army

GE/rd

AG 230.8 CIV (OMG)

3 October 1949

SUBJECT: Liquidation of OMGUS

THRU: Board of Review, OMGUS Nurnberg

To: Mr. Myer L. Casman

1. In accordance with the provisions of OMGUS General Order No. 38, dated 13 August 1949, as provided for in

Executive Order 10062, the Office of Military Government for Germany (U.S) has been declared in liquidation status effective 15 August 1949 and shall continue in such status for a period not to exceed 90 days. Therefore in accordance with Civil Service Commission and Department of the Army Regulations, you are notified that your active duty status will be terminated 3 November 1949, unless there is further need for your services in the liquidation function, or you are required to await transportation. If your services are required in the liquidation function, this notice period will be extended. You will be notified at a later date regarding your transportation schedule. In the event you are finally selected by HICOG this notice will have no effect.

2. If you desire and the work situation permits, any part or all of this 30 day notice period may be spent in a leave status, with or without pay depending upon amount of annual leave to your credit. It is important, *if you desire leave prior to return to the U. S.* that official request be made in writing to your supervisor *immediately upon receipt of this notice.* If the work situation does not permit your leave as of the date requested, your supervisor will indicate the date on which you may enter leave status. Grants of leave beginning any time during this notice period or immediately thereafter cannot exceed a total of 30 calendar days. When you receive your supervisor's approval of your leave you will report immediately to the OMGUS Personnel Office so that shipping schedules may be altered, otherwise your shipping date will be set up as soon after 3 November 1949 as space is available. In the event you elect to take leave, you will remain in a leave status upon your return to present duty station, pending availability of transportation.

3. The Civilian Personnel Office will make the regulations governing liquidation available to you for inspection. If, after such inspection you feel there has been a violation of your rights under the regulations, you have the right to appeal in writing to the Grievance Committee OMGUS. This appeal must be made within *10 days* from the date of this letter and must give your specific reason for appeal-

ing. As a veteran you have a legal right to appeal direct to the Civil Service Commission.

4. You may receive information about your final salary check, lump-sum leave payment, retirement benefits or refunds, and transportation of household effects, dependents and pets from the OMGUS Liquidation Office, Frankfurt Military Post, Headquarters Building, Room 162. Should you desire this office will furnish available information and assistance in obtaining further employment in Europe.

5. In the event that you have competitive Civil Service status you may file application for reinstatement or transfer at any Regional Office or the Control Office of the Civil Service Commission. Application should be made on Standard Form 57 which may be obtained from this office. If you have reemployment rights in any government agency application should be filed not later than 90 days after your return to the Zone of Interior.

6. This office wishes to express genuine appreciation for the benefit of your services during the tenure of your employment with the Office of Military Government for Germany (U.S.).

BY ORDER OF COLONEL PERRY:

HARLE G. BAILEY,
Major, AGD,
Assistant Adjutant.

51

EXHIBIT B-1

Filed January 19, 1955. Harry M. Hull, Clerk

TITLE 10—ARMY

Subtitle A—Organization, Functions and Procedures of the Department of the Army

PART 3—Organization and Procedures of Civil Affairs Division

Restitution of Identifiable Property; Law No. 59

* * * * *

§ 3.75 *General Provisions*—(a) *Article 1; basic principles.* (1) It shall be the purpose of Law No. 59, as set forth in §§ 3.75 to 3.90, to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of this law deprivation of property for reasons of nationality shall not include measures which under recognized rules of international law are usually permissible against property of nationals of enemy countries.

* * * * *

§ 3.82 *General rules of procedure*—(a) *Article 49; basic principles.* (1) The restitution proceedings shall be conducted in such a manner as to bring about speedy and complete restitution. The Restitution Authorities may deviate in individual cases from procedural rules declared applicable by this law, if to do so will serve to accelerate restitution, provided that such deviation does not impair complete investigation of the facts or the legal right to a fair hearing.

* * * * *

§ 3.83 *Filing of claims*—(a) *Article 55; Central Filing Agency.* (1) A Central Filing Agency for the filing of petitions for restitution will be established under regulations to be issued by Military Government.

(2) The Central Filing Agency shall transmit the petition to the appropriate Restitution Agency or Agencies.

(b) *Article 56; form requirements and period of limitation for filing claims.* (1) A petition for restitution pursuant to this law shall be submitted to the Central Filing Agency in writing on or before December 31, 1948. Details as to the form of filing will be provided in regulations to be issued by Military Government.

(2) The petition shall be substantiated by documents or affidavits.

(3) The petition may be effectively filed by any one of several co-claimants.

(4) Any petition, filed by a person who is not entitled to restitution of the property, shall be deemed to have been effectively filed in favor of the true claimant, or where paragraphs (b), (d) and (e) of § 3.77 are applicable, in favor of the successor organizations mentioned therein. The same shall apply to the filing of petition by any such successor organization.

(c) *Article 57; relation to other remedies.* Unless otherwise provided in this law, any claim within the scope of this law may be prosecuted only under the provisions and within the periods of limitation, set forth in this law. However, any claim based on tort, outside the scope of this law, may be prosecuted in the ordinary courts.

(d) *Article 58; contents of petition to be filed.* (1) The petition shall contain a description of the confiscated property. Time, place and circumstances of the confiscation shall be stated as exactly as is possible under the circumstances. If a claim is made for the payment of money, the sum demanded shall be specified if feasible; the basis for the claim shall be substantiated.

(2) So far as known to the claimant, the petition shall contain the name and address of the restitutor, the names and addresses of all persons having or claiming to have an interest in the property, lessees and tenants, if any, and a statement as to all encumbrances existing at the time of the confiscation of the property.

(3) The Central Filing Agency or the Restitution Authorities may request the claimant to supplement his petition by a statement containing the data set forth in subparagraphs (1) and (2) of this paragraph. They may further require the claimant to swear to his statement.

(4) If the claimant does not have his domicile or residence in one of the four Zones of Occupation of Germany or in the City of Berlin, and if he has not appointed there an attorney authorized to accept service of legal papers, he

may nominate in his petition a person domiciled there authorized to receive such papers. If he fails to nominate such a person, the Restitution Agency shall do so and notify the claimant of the appointment.

(5) After a petition has been filed, a receipt shall be issued by the Central Filing Agency notifying the claimant of the Restitution Agency or Agencies to which the petition has been transmitted pursuant to paragraph (a) (2) of this section.

(6) The period of limitation provided for in paragraph (b) (1) of this section shall be deemed to have been complied with by the filing of a written petition with the Central Filing Agency, although it is incomplete or in improper form.

(e) *Article 59; venue.* (1) Any petition for restitution shall be transmitted by the Central Filing Agency to the Restitution Agency of the district in which the property subject to restitution is located. If it appears that a petition has been transmitted to a Restitution Agency which lacks jurisdiction, such petition shall be referred by such Restitution Agency to the Restitution Agency having jurisdiction. The order of reference shall be binding on the agency to which the petition has been referred.

(2) An implementing regulation may provide for additional rules on venue, especially of claims for compensation and ancillary claims.

(f) *Article 60; jurisdiction of subject matter.* The Restitution Authorities shall have jurisdiction of the subject matter irrespective of whether under any other law a claim for restitution would come within the jurisdiction of any ordinary administrative, or other court, or whether no court whatsoever would have jurisdiction.

(g) *Article 61; notice of claim.* (1) The Restitution Agency shall give notice of the petition by formal service on the parties concerned requiring that an answer be filed within two months. Parties concerned shall be deemed the restitutor, persons holding interests in rem, lessees or tenants of the confiscated property, as well as any other person the claimant might demand to be joined in the proceed-

ings. If the German Reich, a Land, a former Land, the former NSDAP or one of its formations or affiliated organizations is a party concerned, service shall be made upon the State Minister of Finance. In the cases described in sentence three the State shall be authorized to join the proceedings as a party in interest.

(2) Where the restitutor or his present address is unknown or where it appears from the petition that any unknown third person may have an interest in the confiscated property, the Restitution Agency shall cause the service by publication of the petition; the restitutor and the unknown third persons shall be requested thereby, within two months, to declare their interests together with proof thereof with the Restitution Agency. Service by publication shall be made pursuant to section 204, paragraph 2, of the Code of Civil Procedure as amended by Control Council Law No. 38 in the form prescribed for a summons. Service shall be deemed to be effective one month after publication in the periodical specified in section 204, paragraph 2, of the Code of Civil Procedure.

(3) Upon service of the petition the case shall be deemed to be pending (*rechtshaengig*).

(4) When the claim for restitution affects real property or an interest in the nature of real property, the Restitution Agency shall request that an entry in the Land Title Register be made to the effect that a claim for restitution has been filed. Notice of restitution, *Rueckerstattungsvermerk*.) The notice of restitution shall be effective against any third person.

(5) The provisions of the Code of Civil Procedure concerning Third Party Practice shall be applicable.

(h) *Article 62; procedure before the restitution agency.*

(1) If no objection has been raised against a petition within the time specified in the notice or in the service by publication, the Restitution Agency shall issue an order granting the petition. Where there is no dispute as to the limit of encumbrances and as to the continued existence of interests, it shall also make the appropriate findings on these matters.

(2) If, however, the claim for restitution does not state a cause of action, or the truth of any of the allegations contained therein is controverted by entries in public records or by public documents available to the Restitution Agency, the latter shall order the claimant to submit a statement within an appropriate period of time. The Agency shall dismiss the petition on the merits if the claimant does not submit within this period an explanation justifying his petition or supplementing the facts alleged therein.

(3) If an objection is made the Restitution Agency shall attempt to reach an amicable settlement unless the futility of such effort is evident. When an amicable settlement has been reached the Restitution Agency shall, on application, record the settlement in writing, and shall deliver a certified copy of the settlement to the parties concerned.

(i) *Article 63; reference to the court.* (1) If an amicable agreement cannot be reached in whole or in part or if the measures to be taken are not within the power of the Restitution Agency, it shall refer the case to the extent necessary to the Restitution Chamber of the District Court having jurisdiction over the Restitution Agency. This shall apply in particular also to cases where only the limit of encumbrance, or the continued existence of interests or the liability for debts is disputed.

(2) Implementing regulations may confer jurisdiction on certain District Courts or on District Courts other than those specified in subparagraph (1) of this paragraph.

(3) The Restitution Agency may stay the proceedings for a period not exceeding six months before referring the case to the Restitution Chamber, if the claimant consents and an amicable agreement may be expected.

(j) *Article 64; appeal (Einspruch).* (1) Any party to the case, by filing an appeal with the Restitution Agency, may appeal to the Restitution Chamber from a decision of the Restitution Agency rendered pursuant to the second sentence of subparagraph (1) of paragraph (e), or paragraph (h) (1) and (2) of this section; the period in which to file the appeal shall be one month; it shall be three months, if the appellant resides in a foreign country. The

period to appeal shall begin to run with the service of the decision to be appealed from.

7990 Paragraph (g) (2) of this section shall be applicable.

(2) The appeal may be based only on a violation of the second sentence of subparagraph (1) of paragraph (e), or paragraph (h) (1) or (2) of this section.

(k) *Article 65; execution.* Agreements recorded by the Restitution Agency and orders of the Restitution Agency which are no longer subject to appeal may be enforced by execution pursuant to the provisions of the Code of Civil Procedure. For this purpose, the Restitution Agency shall have the powers of a court (Vollstreckungsgesetz). In effecting execution, the Restitution Agency may avail itself of the services of other agencies, especially of the courts.

§ 3.84 *Judicial proceedings—(a) Article 66; members of the restitution chamber.* The Restitution Chamber shall be composed of a Presiding Judge and two associate judges, eligible for the office of judge or for the higher Administrative Service. The Presiding Judge shall be a judge normally assigned to a court. The Associate Judges shall be appointed for a term of three years, unless they are professional judges. One of the three judges shall belong to a class of persons persecuted for any of the reasons set forth in § 3.75.

(b) *Article 67; procedure.* (1) The Restitution Chamber shall adjust the legal relations of the parties in interest according to the provisions of this law.

(2) Unless this law provides otherwise, the procedure shall be governed by the rules of procedure applicable in matters of noncontentious litigation, subject, however, to the following modifications:

(i) The Chamber shall order an oral hearing; the hearing shall be public.

(ii) The proceedings may be stayed for a period not to exceed six months, at the request of the claimant. Repeated stays may be granted after the case has been reopened.

(iii) The Chamber shall render partial judgment on one or more of the claims before it, or on part of a claim, where the determination of any counterclaim, offset or equitable lien or any other defense in the nature of an offset or a counterclaim would substantially delay the decision on restitution.

(iv) Without prejudice to the final decision, the Chamber may order the temporary surrender of the confiscated property to the claimant either with or without security. In this case the claimant shall have, with respect to third persons, the rights and obligations of a trustee.

(c) *Article 68; form and contents of the decision.* (1) The decision of the Restitution Chamber shall be pronounced in an order supported by an opinion; the order shall be served on the parties concerned. Immediate execution may be had on this order, a subsequent appeal notwithstanding. The provisions of sections 713, paragraph 2, and sections 713-a to 720 of the Code of Civil Procedure shall be applicable.

(2) An appeal (*sofortige Beschwerde*) may be taken from this order within one month; the appeal may be filed within three months if the appellant resides in a foreign country. The time to appeal shall begin to run from the date of service of the order; § 3.83 (g) (2) shall be applicable. The Civil Division of the Court of Appeals (*Oberlandesgericht*) shall hear the appeal. The appeal may be based only on the ground that the decision violated the law. The provisions of sections 551, 561 and 563 of the Code of Civil Procedure shall be applicable.

(3) Implementing regulations may confer jurisdiction to hear such appeals on a certain Court of Appeals.

(d) *Article 69; Board of Review.* A Board of Review shall have the power to review any decision on any claim for restitution under this Law No. 59 and to take whatever action is deemed necessary with respect thereto. Regulations to be issued by Military Government will provide for the appointment and composition of the Board, its jurisdiction, procedure, and such other matters as are deemed appropriate.

§ 3.85 *Special proceeding*—(a) *Article 70; petition by the public prosecutor.* Where no petition for the restitution of confiscated property has been filed on or before December 31, 1948, the Public Prosecutor at the seat of the Restitution Chamber may file the petition for restitution on behalf of a successor organization provided for in § 3.77 (d). This provision shall not apply if the claimant has waived his claim for restitution in accordance with § 3.77 (e) (3). The petition of the Public Prosecutor must be filed on or before June 30, 1949.

(b) *Article 71; conflict of jurisdiction.* (1) If claims as described in §§ 3.75 to 3.81 (e) inclusive, are asserted by a person entitled to restitution in a court proceeding including the stage of compulsory execution by way of complaint, defense or counterclaim, the Court shall notify the Restitution Agency. The Court may, and on request by the Restitution Agency must, stay the proceedings or temporarily suspend execution by an order from which no appeal may be taken. The Restitution Agency may direct that the claim be dealt with under this law to the exclusion of the jurisdiction of the ordinary civil courts, or it may authorize the claimant to prosecute his claim before the ordinary civil courts; such authorization shall be binding on the latter courts. If an action in the ordinary civil courts is terminated because the claim is being dealt with under this law, the court fees shall be remitted and neither party shall be entitled to costs incurred out of court.

(2) The Court shall report to the Central Filing Agency any action taken under subparagraph (1) of this paragraph.

* * * * *

7992 § 3.90 *Final provisions* * * *

Article 92; implementing and carrying-out provisions.

(1) The Restitution Agencies will be designated by implementing regulations.

(2) Unless otherwise provided in this law, or ordered by Military Government, the Minister President of each State or any Ministers designated by him, shall issue the legal

(iii) The Chamber shall render partial judgment on one or more of the claims before it, or on part of a claim, where the determination of any counterclaim, offset or equitable lien or any other defense in the nature of an offset or a counterclaim would substantially delay the decision on restitution.

(iv) Without prejudice to the final decision, the Chamber may order the temporary surrender of the confiscated property to the claimant either with or without security. In this case the claimant shall have, with respect to third persons, the rights and obligations of a trustee.

(c) *Article 68; form and contents of the decision.* (1) The decision of the Restitution Chamber shall be pronounced in an order supported by an opinion; the order shall be served on the parties concerned. Immediate execution may be had on this order, a subsequent appeal notwithstanding. The provisions of sections 713, paragraph 2, and sections 713-a to 720 of the Code of Civil Procedure shall be applicable.

(2) An appeal (*sofortige Beschwerde*) may be taken from this order within one month; the appeal may be filed within three months if the appellant resides in a foreign country. The time to appeal shall begin to run from the date of service of the order; § 3.83 (g) (2) shall be applicable. The Civil Division of the Court of Appeals (*Oberlandesgericht*) shall hear the appeal. The appeal may be based only on the ground that the decision violated the law. The provisions of sections 551, 561 and 563 of the Code of Civil Procedure shall be applicable.

(3) Implementing regulations may confer jurisdiction to hear such appeals on a certain Court of Appeals.

(d) *Article 69; Board of Review.* A Board of Review shall have the power to review any decision on any claim for restitution under this Law No. 59 and to take whatever action is deemed necessary with respect thereto. Regulations to be issued by Military Government will provide for the appointment and composition of the Board, its jurisdiction, procedure, and such other matters as are deemed appropriate.

§ 3.85 *Special proceeding*—(a) *Article 70; petition by the public prosecutor.* Where no petition for the restitution of confiscated property has been filed on or before December 31, 1948, the Public Prosecutor at the seat of the Restitution Chamber may file the petition for restitution on behalf of a successor organization provided for in § 3.77 (d). This provision shall not apply if the claimant has waived his claim for restitution in accordance with § 3.77 (e) (3). The petition of the Public Prosecutor must be filed on or before June 30, 1949.

(b) *Article 71; conflict of jurisdiction.* (1) If claims as described in §§ 3.75 to 3.81 (e) inclusive, are asserted by a person entitled to restitution in a court proceeding including the stage of compulsory execution by way of complaint, defense or counterclaim, the Court shall notify the Restitution Agency. The Court may, and on request by the Restitution Agency must, stay the proceedings or temporarily suspend execution by an order from which no appeal may be taken. The Restitution Agency may direct that the claim be dealt with under this law to the exclusion of the jurisdiction of the ordinary civil courts, or it may authorize the claimant to prosecute his claim before the ordinary civil courts; such authorization shall be binding on the latter courts. If an action in the ordinary civil courts is terminated because the claim is being dealt with under this law, the court fees shall be remitted and neither party shall be entitled to costs incurred out of court.

(2) The Court shall report to the Central Filing Agency any action taken under subparagraph (1) of this paragraph.

* * * * *

7992 § 3.90 *Final provisions* * * *

Article 92; implementing and carrying-out provisions.

(1) The Restitution Agencies will be designated by implementing regulations.

(2) Unless otherwise provided in this law, or ordered by Military Government, the Minister President of each State or any Ministers designated by him, shall issue the legal

and administrative regulations necessary for the implementation of this law.

(e) *Article 93; jurisdiction of German courts.* (1) German courts are hereby authorized to exercise jurisdiction in civil cases arising under this law against any stateless person having the assimilated status of United Nations displaced persons or against any national of the United Nations not falling within paragraph (f) (ii) (c), (d) and (e) of § 3.11.

(2) German Courts are hereby authorized to exercise jurisdiction in cases involving offenses against any of the provisions of paragraphs (a) to (e), inclusive, of § 3.87 of this Law No. 59 by persons not exempted from the jurisdiction of the German Courts under § 3.11 (f) (1) (i).

* * * * *

(g) *Article 95; effective date.* This Law No. 59 shall become effective in Bavaria, Bremen, Hesse and Wuerttemberg-Baden on November 10, 1947. By order of Military Government. (Office of Military Government for Germany (U. S.).)

§ 3.91 *Regulation No. 1 under Military Government Law No. 59 (§§ 3.75 to 3.90, inclusive).* Pursuant to paragraphs (a) and (b) of § 3.83, it is hereby ordered as follows:

(a) *Establishment of central filing agency.* (1) There is hereby established the Central Filing Agency (Zentralanmeldeamt) provided for in Article 56 of Military Government Law No. 59 (§ 3.83 (b)), the mailing address of which is:

Zentralanmeldeamt (Central Filing Agency), Bad Nauheim, Germany.

(2) This agency is hereby vested with all powers and responsibilities which the Central Filing Agency has under the provisions of Military Government Law No. 59 (§§ 3.75 to 3.90, inclusive).

* * * * *

NATIONAL MILITARY ESTABLISHMENT
Department of the Army

**Organization and Procedures of Civil Affairs Division
Regulation 4 under Military Government Law 59 (Germany);
Establishment of Board of Review**

* * * * *

Sec. 3.95. *Regulation No. 4 under Military Government Law No. 59; establishment of Board of Review.* Pursuant to Article 69 of Military Government Law No. 59, "Restitution of Identifiable Property" (section 3.84 (d) of this part), it is hereby ordered as follows:

(a) *Organization and seat.* The Board of Review (hereinafter referred to as "the Board") provided for in Article 69 of Military Government Law No. 59 is hereby established. Its principal seat shall be at Nurnberg, but it may sit at such other places in the U. S. Zone as it may from time to time deem appropriate.

(b) *Appointment and composition.* (1) The Board shall consist of four members, three of whom shall constitute a quorum. The members of the Board shall be designated by the Military Governor for a term of not less than one year. They shall be citizens of the United States who shall have been admitted to practice law, for at least five years, in the highest courts of one of the United States, its territories, or the District of Columbia. They shall devote their full time to their duties on the Board. They may be removed from the Board by the Military Governor for reasons of health or for other good reasons.

(2) The Military Governor shall appoint one member of the Board to serve as the President. The President shall designate the members to sit in each case and shall be responsible for the administration of the Board.

(3) The Board shall appoint a Legal Advisor to advise it on questions of German law. The Board shall have the power to appoint additional consultants as well as clerks and administrative personnel necessary to assist the Board in the performance of its functions.

(c) *Jurisdiction and powers.* (1) Any party aggrieved by a decision of the Civil Division of the Court of Appeals (Oberlandesgericht) may file with the Board a petition for review of that decision based only on the ground that the decision violates the law.

(2) Any party aggrieved by a decision of the Restitution Chamber may file with the Board a petition for review of the decision of the Restitution Chamber upon the following questions only:

(i) Whether the findings of fact are supported by substantial evidence;

(ii) Whether there has been abuse of discretion by the Chamber;

(iii) Whether prejudice on the part of the Chamber is indicated.

(3) The Board may, in its discretion, refuse to grant petitions for review under subparagraphs (1) and (2), of this paragraph. The decision of the Board is final and not subject to further review.

(4) The Board may, pending final decision upon the petition for review, stay execution of the decision of the Civil Division of the Court of Appeals (Oberlandesgericht) or the Restitution Chamber.

(5) The Board shall have jurisdiction to enter judgment affirming, modifying or reversing, in whole or in part, the decision reviewed and to order execution thereof, or, in its discretion, to remand the case or any part thereof to the Restitution Chamber or the Civil Division of the Court of Appeals which had previously heard the case.

(6) For the purpose of the review of a decision under subparagraph (2) of this paragraph, the Board shall have power to subpoena witnesses, require production of evidence and administer oaths.

(7) The Military Governor may, if he deems it necessary or desirable in order to expedite the administration of Military Government Law No. 59 (sections 3.75-3.90) or to insure uniform application or interpretation of that law, request the Board to issue an advisory opinion on any question submitted by him.

(d) *Decisions.* (1) Decisions, rulings, orders, judgments and advisory opinions of the Board shall be by a majority vote of the members sitting; they shall be incorporated in written opinions except where the Board refuses to review a case.

(2) All opinions of the Board rendered under paragraph (c) of this regulation shall be published in a manner to be determined by Military Government. They shall be published in English and German, but in case of any discrepancy the English text shall prevail.

(3) All opinions of the Board published pursuant to subparagraph (2) of this paragraph shall, as far as they involve the interpretation of Military Government Law No. 59, be binding upon all German courts and authorities.

(e) *Practice and procedure.* The proceedings of the Board shall be conducted in accordance with such rules of practice and procedure as the Board may from time to time prescribe. The members of the Board cannot be challenged by the parties to a proceeding or their counsel; any member of the Board who feels that for any reason he may be biased in connection with a proceeding may disqualify himself.

(f) *Time limitations on petition for review.* Petitions for review under subparagraphs (1) and (2) of paragraph (c) of this regulation may be filed only within the following periods:

(1) Petitions for review under subparagraph (1) of paragraph (c) of this regulation must be filed within one month from the date of service of the decision of the Court of Appeals (Oberlandesgericht), or within three months if the aggrieved party resides in a foreign country.

(2) Where an appeal under paragraph 2 of Article 68 of Military Government Law No. 59 (section 3.84 (c) (2)) has been taken, petitions for review of the same case under subparagraph (2) of paragraph (c) of this regulation cannot be filed before and must be filed during the period specified in subparagraph (1) of this paragraph.

(3) Where no appeal has been filed with the Civil Division of the Court of Appeals under paragraph 2 of Article

68 of Military Government Law No. 59, a petition for review under subparagraph (2) of paragraph (c) of this regulation cannot be filed before, and must be filed within one month after the expiration of the time within which an appeal under Article 68 could have been taken.

(g) *Effective date.* This regulation shall become effective within the Laender of Bavaria, Bremen, Hesse and Wuerttemberg-Baden on 10 August 1948.

(R. S. 161; 5 U. S. C. 22)

By order of Military Government.

B-3

DEPARTMENT OF STATE Bureau of German Affairs

[Public Notice 13]

Entry into Force of Occupation Statute

The following proclamations and regulations issued by the Allied High Commission for Germany and by the United States High Commissioner for Germany are deemed to be of interest to certain United States citizens as having legal effect upon them or their property.

DECLARATION CONCERNING THE ENTRY INTO FORCE OF THE OCCUPATION STATUTE

Whereas by letter dated 12 May 1949 the Military Governors and Commanders-in-Chief of the French, United States and British Zones of Germany, respectively informed the President of the Parliamentary Council at Bonn that the Occupation Statute had been promulgated by them as of that date, and that, "upon the convening of the legislative bodies provided for in the Basic Law and upon the election of the President and the election and appointment of the Chancellor and the Federal Ministers, respectively, in the manner provided for in the Basic Law, the Government of the Federal Republic of Germany will then be established and the Occupation Statute shall thereupon enter into force"; and

Whereas the conditions aforesaid have been satisfied; and it is expedient formally to declare the entry into force of the Occupation Statute;

Now, therefore, the Council of the Allied High Commission hereby declares that the Occupation Statute entered into force as from 21 September 1949.

65

Text of Occupation Statute Promulgated on the 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones

In the exercise of the supreme authority which is retained by the Governments of France, the United States and the United Kingdom,

We General Pierre Koenig, Military Governor and Commander-in-Chief of the French Zone of Germany,

General Lucius D. Clay, Military Governor and Commander-in-Chief of the United States Zone of Germany, and

General Sir Brian Hubert Robertson, Military Governor and Commander-in-Chief of the British Zone of Germany,

Do hereby jointly proclaim the following Occupation Statute:

1. During the period in which it is necessary that the occupation continue, the Governments of France, the United States and the United Kingdom desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation. The Federal State and the participating Laender shall have, subject only to the limitations in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions.

2. In order to ensure the accomplishment of the basic purposes of the occupation, powers in the following fields are specifically reserved, including the right to request and verify information and statistics needed by the occupation authorities:

(a) Disarmament and demilitarization, including related fields of scientific research, prohibitions and restrictions on industry, and civil aviation;

(b) Controls in regard to the Ruhr, restitution, reparations, decartelization, deconcentration, non-discrimination in trade matters, foreign interests in Germany and claims against Germany;

(c) Foreign affairs, including international agreements made by or on behalf of Germany;

(d) Displaced persons and the admission of refugees;

(e) Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities and satisfaction of occupation costs and their other requirements;

(f) Respect for the Basic Law and the Land constitutions;

(g) Control over foreign trade and exchange;

(h) Control over internal action, only to the minimum extent necessary to ensure use of funds, food and other supplies in such manner as to reduce to a minimum the need for external assistance to Germany;

(i) Control of the care and treatment in German prisons of persons charged before or sentenced by the courts or tribunals of the occupying Powers or occupation authorities; over the carrying out of sentences imposed on them; and over questions of amnesty, pardon or release in relation to them.

3. It is the hope and expectation of the Governments of France, the United States and the United Kingdom that the occupation authorities will not have occasion to take action in fields other than those specifically reserved above. The occupation authorities, however, reserve the right, acting under instructions of their Governments, to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments. Before so doing they will formally advise the appropriate German authorities of their decision and of the reasons therefor.

4. The German Federal Government and the Governments of the Laender shall have the power, after due notification to the occupation authorities, to legislate and act in

the fields reserved to these authorities, except as the occupation authorities otherwise specifically direct or as such legislation or action would be inconsistent with decisions or actions taken by the occupation authorities themselves.

5. Any amendment of the Basic Law will require the express approval of the occupation authorities before becoming effective. Land constitutions, amendments thereof, all other legislation, and any agreements made between the Federal State and foreign Governments, will become effective 21 days after its official receipt by the occupation authorities unless previously disapproved by them, provisionally or finally. The occupation authorities will not disapprove legislation unless in their opinion it is inconsistent with the Basic Law, a Land constitution, legislation or other directives of the occupation authorities themselves or the provisions of this Instrument, or unless it constitutes a grave threat to the basic purposes of the occupation.

6. Subject only to the requirements of their security, the occupation authorities guarantee that all agencies of the occupation will respect the civil rights of every person to be protected against arbitrary arrest, search or seizure; to be represented by counsel; to be admitted to bail as circumstances warrant; to communicate with relatives; and to have a fair and prompt trial.

7. Legislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities in accordance with the following provisions:

(a) Legislation inconsistent with the foregoing will be repealed or amended to make it consistent herewith;

(b) Legislation based upon the reserved powers, referred to in paragraph 2 above will be codified;

(c) Legislation not referred to in (a) and (b) will be repealed by the occupation authorities on request from appropriate German authorities.

8. Any action shall be deemed to be the act of the occupation authorities under the powers herein reserved, and effective as such under this Instrument, when taken or evi-

denced in any manner provided by any agreement between them. The occupation authorities may in their discretion effectuate their decisions either directly or through instructions to the appropriate German authorities.

9. After 12 months and in any event within 12 months of the effective date of this Instrument the occupying Powers will undertake a review of its provisions in the light of experience with its operation and with a view to extending the jurisdiction of the German authorities in the legislative, executive and judicial fields.

Publication of this notice is not intended to and does not in any way add to or detract from the presently existing legal force and effect of the matter quoted above.

* * * * *

TRANSITIONAL PROVISIONS

The following proclamations and regulations issued by the Allied High Commission for Germany and by the United States High Commissioner for Germany are deemed to be of interest to certain United States citizens as having legal effect upon them or their property.

[Law No. 3]

TRANSITIONAL PROVISIONS

The Council of The Allied High Commission enacts as follows:

Article 1

Where any legislation repealed by the Occupation Authorities contained any provision repealing other legislation, such other legislation shall not be deemed to be revived in the absence of an express provision to that effect.

Article 2

Where any legislation has been revised or replaced by the Occupation Authorities, references in other legislation to articles, sections or paragraphs of the former text shall be deemed to be references to the corresponding provisions of the new text, notwithstanding any difference in the numbering or lettering.

Article 3

Any implementing regulations issued in pursuance of any legislation which has been revised or replaced by the Occupation Authorities shall remain in force, unless repealed under or inconsistent with, the new legislation.

Article 4

No person may be prosecuted for an offence under legislation repealed by the Occupation Authorities unless such offence also constitutes a violation of legislation in force or proceedings are instituted within three months of the repeal.

Article 5

References in any legislation enacted before the entry into force of the Occupation Statute to the Control Council, the Supreme Commander Allied Expeditionary Force, the Commanding General, the Armed Forces, Military Government, the Military Governor and to other authorities shall, where the context so requires or admits, be deemed to refer to the appropriate authorities exercising the particular functions mentioned in such legislation.

Article 6

This law shall become effective on the 21st September 1949.

Done at Bonn, Petersburg, on 21 September 1949.

A. FRANCOIS-PONCET,

French High Commissioner for Germany.

JOHN J. McCLOY,

U. S. High Commissioner for Germany.

P. H. ROBERTSON,

U. K. High Commissioner for Germany.

Publication of this notice is not intended to and does not in any way add to or detract from the presently existing legal force, and effect of the matter quoted above.

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[Public Notice 39]

64

Restitution of Identifiable Property

The following proclamations and regulations issued by the United States High Commissioner for Germany, which amend Military Government Law No. 59 (12 F. R. 7983; 10 CFR, 1947 Supp. 3.75) are deemed to be of interest to certain United States citizens as having legal effect upon them or their property.

[Law No. 2]

[Military Government Law No. 59, Amdt. 3]

Restitution of Identifiable Property

The United States High Commissioner for Germany enacts as follows:

Article 1

Article 69 of United States Military Government Law No. 59, Restitution of Identifiable Property, is hereby amended to read as follows:

Article 69—Court of Restitution Appeals

The United States Courts of the Allied High Commission for Germany shall have jurisdiction to review any decision on any claim for restitution under this law and to take any action which they shall deem necessary or proper in respect thereof. The United States High Commissioner for Germany may provide by regulation for the establishment of a standing panel of the United States Courts of the Allied High Commission for Germany to exercise such jurisdiction as a Court of Restitution Appeals. Such regulations shall provide for the jurisdiction and procedure of such court and for such other matters as are deemed appropriate.

Article 2

This Law is applicable within the Laender of Bavaria, Hesse, Wuerttemberg-Baden and Bremen. It shall become effective on January 1, 1950.

Done at Frankfurt-on-Main, on 28 December 1949.

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[Military Government Law No. 59, Reg. 7]

Restitution of Identifiable Property

The United States High Commissioner for Germany enacts as follows:

Regulation No. 4 "Establishment of Board of Review" under Military Government Law No. 59 is hereby amended to read as follows:

Article 1—Establishment of Court of Restitution Appeals

1. Pursuant to Article 69 of Military Government Law No. 59 as amended by Law No. 2 of the United States High Commissioner for Germany, a court of restitution appeals is hereby established to exercise the jurisdiction and powers as provided in such Article and to be designated "Court of Restitution Appeals of the United States Courts of the Allied High Commission for Germany".

2. The Court of Restitution Appeals shall consist of not less than three members to be designated as hereinafter provided.

3. The Judicial Council of the United States Courts of the Allied High Commission for Germany shall:

a. Determine the principal seat of the Court of Restitution Appeals:

b. Assign from the Judiciary of the United States Courts of the Allied High Commission for Germany justices and judges to said Court and designate one of such justices to serve as its president; and

c. From time to time make such recommendations as it shall deem necessary or proper in order to facilitate

1548 the proceedings of the Court of Restitution Appeals.

Article 2—Jurisdiction and Powers

1. Any party aggrieved by a decision of the Civil Division of the German Court of Appeals (Oberlandesgericht) may file with the Court of Restitution Appeals a Petition for review of that decision based only on the ground that the decision violates the law.

2. Any party aggrieved by a decision of the Restitution Chamber may file with the Court of Restitution Appeals a petition for review of the decision of the Restitution Chamber upon the following grounds only:

a. That the findings of the fact upon which such decision is based are not supported by substantial evidence;

b. That there has been abuse of discretion by the Chamber;

c. That prejudice on the part of the Chamber is indicated.

3. The Court of Restitution Appeals, in its discretion, may refuse to grant petitions for review under paragraphs 1 and 2, above.

4. The Court of Restitution Appeals, pending final decision upon the petition for review, may stay execution of the decision of the Civil Division of the German Court of Appeals (Oberlandesgericht) or the Restitution Chamber.

5. The Court of Restitution Appeals shall have jurisdiction to enter judgment affirming, modifying or reversing, in whole or in part, the decision reviewed and to order execution thereof, or, in its discretion, to remand the case or any part thereof to the Restitution Chamber or the Civil Division of the German Court of Appeals (Oberlandesgericht) which had previously heard the case.

6. For the purpose of the review of a decision under paragraph 2, above, the Court of Restitution Appeals shall have power to subpoena witnesses, require production of evidence and administer oaths.

7. The United States High Commissioner for Germany may, in his discretion, request the Court of Restitution

Appeals to issue an advisory opinion on any question submitted by him.

8. Decisions of the Court of Restitution Appeals shall be final and not subject to further review.

Article 3—Decisions

1. Decisions, rulings, orders, judgments and advisory opinions of the Court of Restitution Appeals shall be by a majority vote of the members sitting, and shall be incorporated in written opinions, except in cases where such Court refuses to review a matter.

2. All opinions of the Court of Restitution Appeals rendered under Article 2 of this Regulation shall be published in a manner to be determined by the United States High Commissioner for Germany. They shall be published in English and German, but in case of any discrepancy the English text shall prevail.

3. All opinions of the Court of Restitution Appeals published pursuant to paragraph 2 of this Article shall, insofar as they involve the interpretation of Military Government Law No. 59, be binding upon all German courts and authorities.

Article 4—Practice and Procedure

The proceedings of the Court of Restitution Appeals shall be conducted in accordance with such rules of practice and procedure, including provisions for costs and fees, as the Court of Appeals of the United States Courts of the Allied High Commission for Germany may from time to time prescribe. The members of the Court of Restitution Appeals cannot be challenged by the parties of a proceeding or their counsel. Any member of said Court who feels that for any reason he may be biased in connection with a proceeding may disqualify himself.

Article 5—Time Limitations on Petition for Review

Petitions for review under paragraphs 1 and 2 of Article 2 of this Regulation may be filed only within the following periods:

a. Petitions for review under paragraph 1 of Article 2 of this Regulation must be filed within one month after the date of service of the decision of the Civil Division of the German Court of Appeals (Oberlandesgericht), or within three months thereafter, if the aggrieved party resides in a foreign country.

b. Where an appeal under paragraph 2 of Article 68 of Military Government Law No. 59 has been taken, petitions for review of the same case under paragraph 2 of Article 2 of this Regulation cannot be filed before and must be filed during the period specified in subparagraph a. of this Article.

c. Where no appeal has been filed with the Civil Division of the German Court of Appeals (Oberlandesgericht) under paragraph 2 of Article 68 of Military Government Law No. 59, a petition for review under paragraph 2 of Article 2 of this Regulation cannot be filed before, and must be filed within one month after, the expiration of the time within which an appeal under Article 68 could have been taken.

Article 6—Transitional Provisions

All proceedings pending before the Board of Review on the effective date of this Regulation as amended and all decisions and actions made or taken by said Board in the due exercise of its jurisdiction and powers shall be deemed proceedings before and decisions and actions of the Court of Restitution Appeals. Said Court in the interest of justice shall permit such proceedings to go forward from the stage at which such proceedings became subject to its jurisdiction or from any earlier stage and may take any action in the premises which it may deem appropriate to protect the interests of the parties thereto: *Provided, however,* That the Court of Restitution Appeals shall not review or reserve final decisions of the Board of Review.

Article 7

This Regulation is applicable within the Laender of Bavaria, Hesse, Wuerttemberg-Baden and Bremen. It shall become effective on 1 January 1950.

Done at Frankfurt-on-Main, the 28th day of December 1949.

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LAW No. 7

Restitution Appeals in the United States Sector of Berlin

The United States High Commissioner enacts as follows:

Article 1

1. In the United States Sector of Berlin, the power to review any decision on any petition for restitution pursuant to Article 63 of Berlin Kommandatura Order (49) 180 (Restitution of Identifiable Property to Victims of Nazi Oppression) shall be exercised by the Court of Restitution Appeals of the United States Courts of the Allied High Commission for Germany.

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REGULATION No. 10

UNDER

MILITARY GOVERNMENT LAW No. 59

(Restitution of Identifiable Property)

The United States High Commissioner for Germany issues the following Regulation:

Article 1

Article 2 of Regulation No. 7 under Military Government Law No. 59 is hereby amended by adding thereto the following paragraph:

“9. Justices and judges of the Court of Restitution Appeals shall have such power to punish for contempt of court as is granted by law to justices of the Court of Appeals of the United States Courts of the Allied High

Commission for Germany, and shall be governed, in their exercise of this power, by the same provisions of law which govern its exercise by such justices."

Article 2

This Regulation is applicable within the Laender of Bavaria, Bremen, Hesse and Wuerttemberg-Baden.

Done at Frankfurt-on-Main, on February 19, 1951.

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B-10

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LAW No. 21

United States Court of Restitution Appeals of the Allied High Commission for Germany

The United States High Commissioner enacts as follows:

Article 1

Composition, Jurisdiction and Powers of the Court of Restitution Appeals

1. A United States Court of Restitution Appeals of the Allied High Commission for Germany is hereby established. The United States Court of Restitution Appeals shall have jurisdiction to review any decision on any claim for restitution under Military Government Law No. 59, "Restitution of Identifiable Property", and to take any action which it shall deem necessary or proper in respect thereof.

2. The Court of Restitution Appeals shall consist of three Justices, one of whom shall be appointed President of the Court, together with such other Justices or Judges as may be assigned to sit as Justices of the Court of Restitution Appeals pursuant to Article 6, Section 5 of this law. The seat of the Court shall be determined by the United States High Commissioner. The Court shall hold sessions elsewhere in the United States Area of Control for Germany (which term is defined as comprising the Laender of Bremen, Bavaria, Hesse, Wuerttemberg-Baden and the United States Sector of Berlin), when directed to do so pursuant to Article 6, Section 4 of this law.

3. A majority of the Justices of the Court of Restitution Appeals shall constitute a quorum, and decisions, rulings, orders, judgments and advisory opinions shall be by a majority vote of the Justices sitting. The Court may sit in panels consisting of not fewer than three Justices. A majority of the Justices on any panel shall constitute a quorum, and the decision of the majority of the Justices of any panel shall constitute the decision of the Court. The President of the Court of Restitution Appeals shall designate the members of the panels of the Court, the Presiding Justice thereof, and the times at which the panels shall sit, and shall assign the cases to be heard by each panel. The President shall be responsible for the assignment among the members of the Court of all matters coming before the Court, and he shall, in the event of his absence or disability, designate one of the Justices to act as President.

4. Any party aggrieved by a decision of the Civil Division of the German Court of Appeals (Oberlandesgericht) may file with the Court of Restitution Appeals a petition for review of that decision based only on the ground that the decision violates the law.

5. Any party aggrieved by a decision of the Restitution Chamber may file with the Court of Restitution Appeals a petition for review of the decision of the Restitution Chamber upon the following grounds only:

- a. That the findings of fact upon which such decision is based are not supported by substantial evidence;
- b. That there has been abuse of discretion by the chamber;
- c. That prejudice on the part of the Chamber is indicated.

6. The Court of Restitution Appeals, in its discretion, may refuse to grant petitions for review under Sections 4 and 5 of this Article.

7. The Court of Restitution Appeals, pending final decision upon the petition for review, may stay execution of the decision of the Civil Division of the German Court of Appeals (Oberlandesgericht) or of the Restitution Chamber.

8. The Court of Restitution Appeals shall have jurisdiction to enter judgment affirming, modifying or reversing, in whole or in part, the decision reviewed and to order execution thereof, or in its discretion, to remand the case or any part thereof to the Restitution Chamber or the Civil Division of the German Court of Appeals (Oberlandesgericht) which had previously heard the case.

9. For the purpose of the review of a decision under Section 5 of this Article, the Court of Restitution Appeals shall have power to subpoena witnesses, require production of evidence and administer oaths. The Court of Restitution Appeals shall have power to punish for contempt of court (whether or not committed in its presence) and to exercise such other powers as may be incidental to the performance of its judicial functions, subject to the same provisions of law which govern the exercise of such powers by Justices of the United States Court of Appeals of the Allied High Commission for Germany.

10. The United States High Commissioner may request the Court of Restitution Appeals to issue an advisory opinion on any question submitted by him.

11. Decisions of the Court of Restitution Appeals shall be final and not subject to further review.

Article 2

Cases Removed or Transferred from German Courts

1. The powers conferred upon the United States Court of Restitution Appeals under this law may be exercised by said Court in any case removed, transferred or referred to said Court from a German court under Article 6 of United States High Commissioner Law No. 6 or under Allied Kommandatura Law No. 7.

2. In addition to the powers referred to in Section 1 of this Article, and notwithstanding any provision of this or any other law of the United States High Commissioner, the Court of Restitution Appeals may, in any case so referred to it from a German court, suspend for a definite or indefinite period, declare null and void or invalidate as of any date, in whole or in part, any proceedings, sentences or in-

terlocutory or final judgments, decrees or orders of the German court, and may proceed with final adjudication or other appropriate disposition of such case or may remand such case to a German court with instructions for disposition.

3. The Court of Restitution Appeals shall have, in any case removed, transferred or referred to it from German courts, in addition to the jurisdiction otherwise conferred by this law, all jurisdiction over persons and subject matter which, under German law, the German court in which the case was originally instituted would have had but for the provisions of Allied High Commission Law No. 13 and the exercise of the powers of removal and intervention afforded by Article 6 of United States High Commissioner Law No. 6 and but for the provisions of Allied Kommandatura Law No. 7 and the exercise of such powers thereunder. In addition thereto, the Court of Restitution Appeals shall have power to determine the jurisdiction of the German Court over the persons and subject matter in the case so removed.

Article 3

Decisions

1. Decisions, rulings, orders, judgments and advisory opinions of the United States Court of Restitution Appeals shall be incorporated in written opinions, except in cases where the court refuses to review a matter under Article 1, Section 6 of this law. An opinion of the Court shall be deemed to be published within the meaning of this Section when a copy thereof is filed with the Clerk of the Court. Such copy shall be open to inspection by any member of the general public. Reproduction and distribution of English and German texts of opinions of the Court shall be made in accordance with the rules of practice and procedure prescribed by the Court.

2. All opinions of the Court of Restitution Appeals which are published within the meaning of Section 1 of this Article shall, insofar as they involve the interpretation of Military Government Law No. 59, be binding upon all German courts and authorities. In case of discrepancy between the English

and German texts of an opinion of the Court, the English text shall prevail.

Article 4

Practice and Procedure

1. The proceedings of the United States Court of Restitution Appeals shall be conducted in accordance with such rules of practice and procedure, including provision for costs and fees, as the Court may from time to time prescribe. The Court may prescribe the form and style of its seal and the form of papers filed with it or issued by it. Subject to and consistent with applicable legislation, directives and regulations, the Court of Restitution Appeals may prescribe and publish rules for the admission and discipline of persons who shall be entitled to practice in the Court of Restitution Appeals.

2. The Justices of the Court of Restitution Appeals shall not be subject to challenge by the parties to a proceeding or their counsel. Any Justice who feels that for any reason he may be biased in connection with a proceeding may disqualify himself.

Article 5

Time Limitations on Petition for Review

Petitions for review under Article 1, Sections 4 and 5 of this law may be filed only within the following periods:

a. Petitions for review under Article 1, Section 4 of this law shall be filed within one month after the date of service of the decision of the Civil Division of the German Court of Appeals (Oberlandesgericht), or within three months thereafter, if the aggrieved party resides in a foreign country.

b. Where an appeal under paragraph 2 of Article 68 of Military Government Law No. 59 has been taken, petitions for review of the same case under Article 1, Section 5 of this law shall not be filed before and shall be filed during the period specified in subparagraph (a.) of this Article.

c. Where no appeal has been filed with the Civil Division of the German Court of Appeals (Oberlandesgericht) under paragraph 2 of Article 68 of Military Government Law No. 59, a petition for review under Article 1, Section 5 of this law shall not be filed before, and shall be filed within one month after, the expiration of the time within which an appeal under Article 68 could have been taken.

Article 6

Administration of the Court

1. Except as hereinafter provided, the President of the United States Court of Restitution Appeals shall have responsibility for the administration of the business of the Court of Restitution Appeals.

2. The Administrative Officer of the Courts, holding office pursuant to Article 3, Section 2 of United States High Commissioner Law No. 20, shall report to the High Commissioner on the business and administration of the Court of Restitution Appeals. The President and the Clerk of the Court shall provide the Administrative Officer with such information as he may deem necessary to carry out this function.

3. The Administrative Officer shall, consistently with applicable United States Foreign Service Acts and Regulations, designate a Clerk of the Court and administrative and supporting personnel, both American and German, to serve the Court of Restitution Appeals. The Administrative Officer shall prescribe the records to be kept by the Clerk of the Court and, subject to applicable directives of the Office of the United States High Commissioner, the measures to be taken by the Clerk to account for and dispose of money or other property deposited with him.

4. The Administrative Officer may designate places other than the seat of the Court where the Court of Restitution Appeals shall hold special sessions.

5. The Judicial Committee established by United States High Commissioner Law No. 20, may, with the advice of the President of the Court of Restitution Appeals,

assign Associate Justices of the United States Court of Appeals of the Allied High Commission for Germany and United States Judges for Germany to sit as Justices of the Court of Restitution Appeals, and determine the period during which such Justices and Judges shall so serve.

ARTICLE 7

Appointment of Justices

1. The Justices of the Court of Restitution Appeals shall be appointed by the United States High Commissioner and shall hold office subject to applicable United States Foreign Service Acts and Regulations. The President of the Court shall be designated by the United States High Commissioner.

2. The Justices appointed under this Article shall take the following oath before performing the duties of their respective offices: "I swear (or affirm) that I will, at all times, administer justice without fear or favor to all persons of whatever creed, race, color, or political opinion they may be, that I will do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a Justice of the United States Court of Restitution Appeals according to law and to the best of my abilities and understanding (So help me God)". The United States High Commissioner or his representative shall administer the oath.

3. The Justices of the Court of Restitution Appeals shall be graduates in law and members in good standing at the Bar of one of the States of the United States or of the District of Columbia and shall have been engaged in active legal work for at least ten years; provided, however, that the above qualifications may be waived by the United States High Commissioner.

ARTICLE 8

Repeals and Transitional Provisions

1. Article 69 of United States Military Government Law No. 59, United States High Commissioner Law No. 2, amend-

ing Military Government Law No. 59, United States High Commissioner Law No. 7 and all Regulations thereunder and Regulations Nos. 7, 8, 9, and 10 under Military Government Law No. 59 are hereby repealed.

2. All proceedings pending before the Board of Review created by Military Government Law No. 59 on the effective date of Regulation No. 7 under Military Government Law No. 59 and all decisions and actions made or taken by such Board in the due exercise of its jurisdiction and powers shall be deemed proceedings before and decisions and actions of the United States Court of Restitution Appeals. The Court of Restitution Appeals shall permit such proceedings to go forward from the stage at which such proceedings became subject to its jurisdiction or from any earlier stage and may take any action in the premises which it may deem appropriate to protect the interests of the parties thereto; provided, however, that the Court shall not review or reverse final decisions of the Board of Review.

3. All proceedings pending, on the effective date of this law, before the Court of Restitution Appeals established by Regulation No. 7 under Military Government Law No. 59 as amended and all decisions and actions made or taken by such Court in the due exercise of its jurisdiction and powers shall be deemed proceedings before and decisions and actions of the Court of Restitution Appeals established by this law.

4. Any function or power entrusted, on the effective date of this law, under any provision of law to the Court of Restitution Appeals as one of the "United States Courts of the Allied High Commission for Germany" shall be deemed to be entrusted to the Court of Restitution Appeals established under this law.

ARTICLE 9

Effective Date and Area of Application

This law is applicable within the Laender of Bavaria, Bremen, Hesse, and Wuerttemberg-Baden, and shall become

effective there on the date of its publication in the Official Gazette of the Allied High Commission. This law is also applicable in the United States Sector of Berlin and shall become effective there on the date of its publication in the Official Gazette of the Allied Kommandatura Berlin.

Done at

Frankfurt-on-Main, on May 24, 1951.

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86 Filed January 19, 1955. Harry M. Hull, Clerk

OFFICE OF THE U. S. HIGH COMMISSIONER FOR GERMANY
APO 757

Staff Announcement

No. 1

21 September 1949

**Establishment of the Office of the U. S. High Commissioner
for Germany**

1. Effective 21 September 1949, in accordance with the provisions of Executive Order No. 10062, the authority residing in the U. S. Military Governor and the Office of Military Government for Germany (U.S.) for the governmental functions of the U. S. in Germany is assumed fully and exclusively by the U. S. High Commissioner for Germany. All powers vested in the United States Military Governor, including those vested under all international agreements, are transferred to the U. S. High Commissioner for Germany.

2. The Office of the U. S. High Commissioner for Germany is hereby established as the agency through which the authority vested in the U. S. High Commissioner shall be exercised. Its organization shall be as shown in the attached charts, and its functions shall be assigned among its constituent elements as set forth in separate issuances, effective this date.

3. As provided in Executive Order 10063, the undersigned as U. S. High Commissioner for Germany, shall also be ECA Representative for Germany and shall be assisted

by the Chief, ECA Special Mission to Germany, who shall also be Director, Office of Economic Affairs in the Office of the U. S. High Commissioner for Germany.

4. Transfer of funds, records, supplies and equipment from the Office of Military Government for Germany (U. S.) and appointment of personnel to the Office of the U. S. High Commissioner for Germany shall be accomplished as appropriate and are not effected by the terms of this announcement.

JOHN J. McCLOY,
U. S. High Commissioner for Germany.

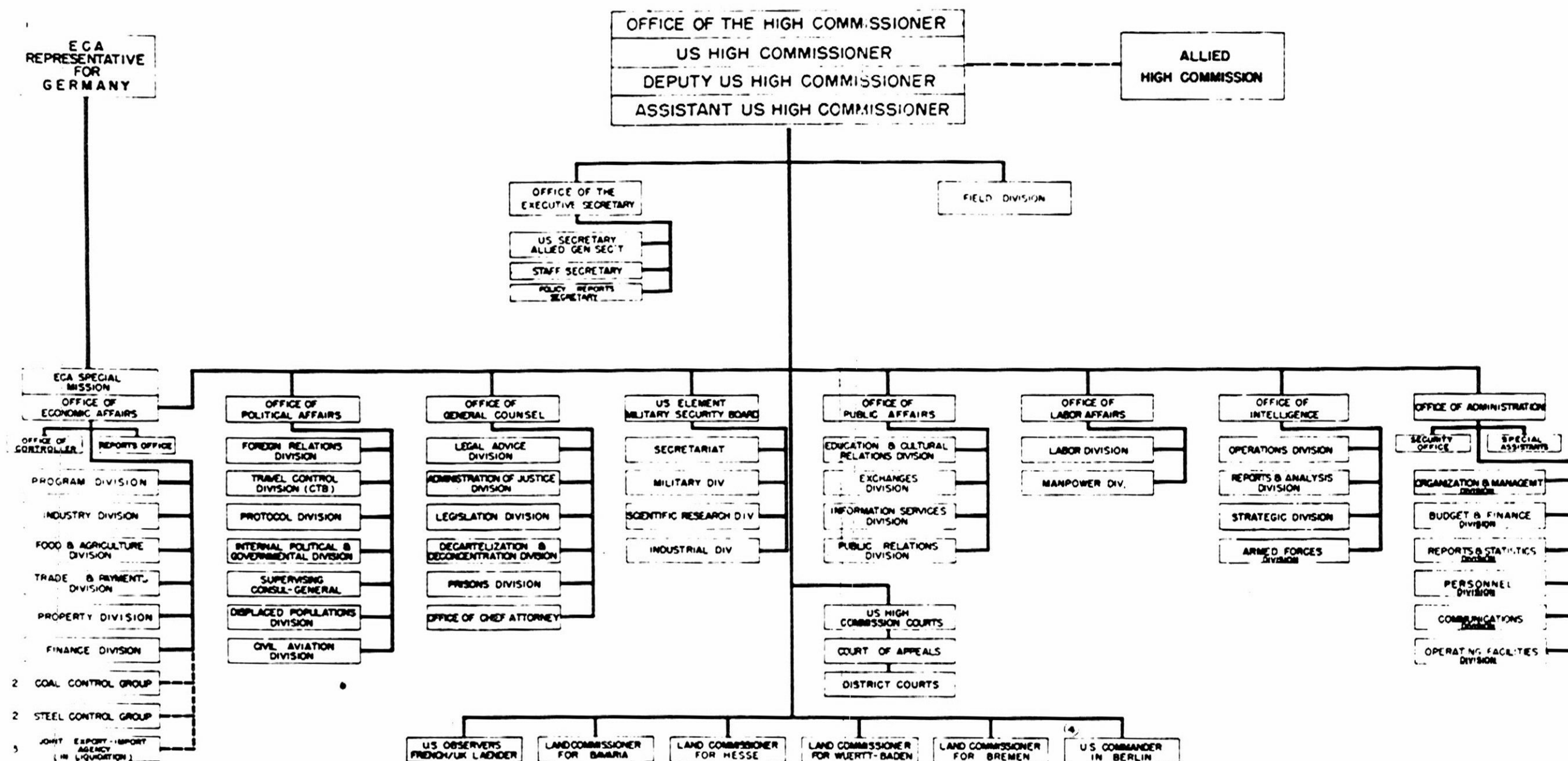
Attachments: 3 Charts

1. Office of the U. S. High Commissioner for Germany.
2. Office of the Land Commissioner (prototype)
3. Berlin Element, Office of the U. S. High Commissioner for Germany.

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ORGANIZATION CHART OFFICE OF THE US HIGH COMMISSIONER FOR GERMANY



1 ECA REPRESENTATIVE FOR GERMANY - BY EXECUTIVE ORDER, MR JOHN J. BUCKLEY, AS US HIGH COMMISSIONER FOR GERMANY, ALSO SERVES AS ECA REPRESENTATIVE FOR GERMANY. HE HAS THE IMMEDIATE SUPERVISION OF THE ADMINISTRATOR FOR ECONOMIC COOPERATION AND COORDINATION WITH THE US SPECIAL REPRESENTATIVE FOR EUROPE (SUBJECT, HOWEVER, TO CONSULTATION WITH AND ULTIMATE DIRECTION BY THE PRESIDENT)

2 US ELEMENTS, COAL CONTROL GROUP AND STEEL CONTROL GROUP, RECEIVE POLICY GUIDANCE FROM DIRECTOR OF ECONOMIC AFFAIRS. FOR THIRTYTHREE ACTIVITIES, THE GROUPS ARE RESPONSIBLE TO THE ECONOMIC COMMITTEE, ALLIED HIGH COMMISSION

3 US ELEMENT RECEIVES POLICY GUIDANCE FROM DIRECTOR ECONOMIC AFFAIRS. AGENCY IS ADMINISTRATIVELY RESPONSIBLE TO FOREIGN TRADE AND EXCHANGE COMMITTEE, ALLIED HIGH COMMISSION, DURING LIQUIDATION

4 THE US COMMANDER, BERLIN, SERVES AS THE REPRESENTATIVE IN BERLIN OF THE US HIGH COMMISSIONER FOR GERMANY, FOR MILITARY MATTERS - HE REPORTS TO THE COMMANDER-IN-CHIEF, EUROPEAN COMMAND

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Filed January 19, 1955. Harry M. Hull, Clerk

OFFICE OF THE U. S. HIGH COMMISSIONER FOR GERMANY
APO 757

Staff Announcement
No. 1 (Amended)

22 September 1949

**Establishment of the Office of the U. S. High Commissioner
for Germany**

1. Effective 21 September 1949, in accordance with the provisions of Executive Order No. 10062, the authority residing in the U. S. Military Governor and the Office of Military Government for Germany (U.S.) for the governmental functions of the U. S. in Germany is assumed fully and exclusively by the U. S. High Commissioner for Germany. All powers vested in the United States Military Governor, including those vested under all international agreements, are transferred to the U. S. High Commissioner for Germany. *All laws and directives issued under the authority of the Military Governor or the Office of Military Government for Germany (U.S.) shall continue in effect until superseded or revoked by the Office of the U. S. High Commissioner for Germany.*

2. The Office of the U. S. High Commissioner for Germany is hereby established as the agency through which the authority vested in the U. S. High Commissioner shall be exercised. Its organization shall be as shown in the attached charts, and its functions shall be assigned among its constituent elements as set forth in separate issuances, effective this date.

3. As provided in Executive Order 10063, the undersigned, as U. S. High Commissioner for Germany, shall also be ECA Representative for Germany and shall be assisted by the Chief, ECA Special Mission to Germany, who shall also be Director, Office of Economic Affairs in the Office of the U. S. High Commissioner for Germany.

4. Transfer of funds, records, supplies and equipment from the Office of Military Government for Germany (U.S.)

and appointment of personnel to the Office of the U. S. High Commissioner for Germany shall be accomplished as appropriate and are not effected by the terms of this announcement.

JOHN J. McCLOY,
U. S. High Commissioner for Germany.

Attachments: 3 Charts

1. Office of the U. S. High Commissioner for Germany
2. Office of land Commissioner (prototype)
3. Berlin Element, Office of the U. S. High Commissioner for Germany.

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EXECUTIVE ORDER 10062

Establishing the Position of United States High Commissioner for Germany

By virtue of the authority vested in me by the Constitution and the Statutes, including the Foreign Service Act of 1946 (60 Stat. 999), and as President of the United States and Commander in Chief of the Armed Forces of the United States, it is ordered as follows:

1. There is hereby established the position of United States High Commissioner for Germany, which position shall be that of Chief of Mission, Class 1, in accordance with the provisions of the said Foreign Service Act of 1946.

2. The United States High Commissioner for Germany, hereinafter referred to as the High Commissioner, shall be the supreme United States authority in Germany. The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946.

3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements.

THE WHITE HOUSE

June 6, 1949.

HARRY S. TRUMAN.

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Chronology of Administrative Take-Over from OMGUS to HICOG¹

June 6, 1949—Executive Order 10062, Establishing the Position of United States High Commissioner for Germany.

¹ The following abbreviations are used in the chronology: OMGUS for the Office of Military Government for Germany (United States); HICOG for the Office of the United States High Commissioner for Germany; EUCOM for European Command.

July 19, 1949—OMGUS General Order No. 26, Establishment of Office of Administration. This order, signed by the United States High Commissioner for Germany, established a Provisional Office of Administration in OMGUS and served primarily to assist the High Commissioner in the planning and establishment of the new HICOG organization. It absorbed the following OMGUS units: Civilian Personnel Branch, Office of Personnel; Budget and Fiscal Branch, Control Office; Organization and Program Branch, Control Office; Administrative Office, Office of the Political Adviser.

July 29, 1949—OMGUS General Order No. 27, Approval of Plan of Organization for HICOG. This order established the basic organizational pattern for the major HICOG functional offices and also specifically assigned all major functional areas to designated offices.

August 12, 1949—OMGUS General Order No. 36, Establishment of Headquarters, OMGUS, in Frankfurt. Effective August 14, 1949, this order transferred the Headquarters of the Military Governor from Berlin to Frankfurt, abolished the Office of the Chief of Staff, OMGUS, and of the Deputy Chief of Staff (Bad Nauheim), and established the Provisional Office of the Executive Secretary, to which the office of Secretary General, OMGUS, was transferred.

August 13, 1949—OMGUS General Order No. 38, Announcement of Liquidation Status of OMGUS. By this order, OMGUS was officially placed in a state of liquidation. During this period the final development of internal staffing structure and selection of personnel by the newly established HICOG offices was to take place.

September 3, 1949—OMGUS General Order No. 46, Establishment of Provisional Office of Economic Affairs. This order established on September 3, 1949, the Provisional Office of Economic Affairs, OMGUS, in which were incorporated the functions, personnel, equipment, and records of the Office of the Economics Adviser, OMGUS; Office of the Finance Adviser, OMGUS; and Finance Division, OMGUS. The order also transferred to the Director

of the Provisional Office of Economic Affairs the duties and responsibilities of the United States Chairman of the Bipartite Control Office. Responsibility for United States representation and direction for the Joint Export-Import Agency also lodged in the Director of the Provisional Office of Economic Affairs.

54 September 3, 1949—OMGUS General Order No. 43, Transfer of Administrative Services, Bipartite Control Office. Effective September 3, 1949, this order transferred all responsibilities for administrative and logistic support of the Office of the United States Chairman of the Bipartite Control Office to the Provisional Office of Administration, OMGUS.

September 3, 1949—OMGUS General Order No. 45, Establishment of Provisional Office of General Counsel. This order, established on September 3, 1949, the Provisional Office of General Counsel, OMGUS, which absorbed all of the functions and personnel, equipment, and records of Legal Division, OMGUS.

September 3, 1949—OMGUS General Order No. 44, Establishment of Provisional Office of Public Affairs. This order established on September 3, 1949, a Provisional Office of Public Affairs, OMGUS, which included the functions, personnel, equipment, and records of Information Services Division, OMGUS; Education and Cultural Relations Division, OMGUS; and Public Information Office, OMGUS.

September 21, 1949—HICOG Staff Announcement No. 1, Establishment of Office of the United States High Commissioner for Germany. This staff announcement established, effective September 21, 1949, the Office of the United States High Commissioner for Germany and transferred all powers and responsibilities of the United States Military Governor to that Office.

September 21, 1949—HICOG Staff Announcements No's. 2 through 12. Issued concurrently with staff announcement No. 1, these staff announcements established the formal organizational pattern and assignment of functional responsibilities for each of the Offices of Headquarters, HICOG.

September 21, 1949—HICOG Staff Announcement No. 13, Staff Appointments. Appointments to key positions in HICOG were listed in this staff announcement, the appointments to become effective September 21, 1949.

September 21, 1949—HICOG Staff Announcement No. 14, Statement of Policy Governing Headquarters—Field Relationships in the United States Zone. This staff announcement established and outlined the policies governing relationships between the Headquarters, HICOG, and the Offices of the Land (State) Commissioners in the United States Zone, describing in particular the responsibilities of Headquarters as contrasted to those of the Land (State) Commissioners and listed the special activities which would be administered and operated centrally from Headquarters, HICOG, including such activities as civil aviation, publishing operations, and the United States High Commission Courts.

September 21, 1949—HICOG Staff Announcement No. 15, Statement of Policy Covering Responsibilities and Relationships of the United States Commander, Berlin. This staff announcement describes the same relationships between Headquarters, HICOG, and the United States Commander, Berlin, as those described in HICOG staff announcement No. 14.

January 9, 1950—The Deputy United States High Commissioner approved the staffing pattern and plan for administrative services for the United States Headquarters, Bad Godesberg (Bonn).

55 In summary, remaining functions and responsibilities of the following OMGUS offices and divisions were transferred to HICOG as indicated below:

OMGUS Office/Division	HICOG Office
Adjutant General	Office of Administration
Armed Forces Division	
Military and Air License Branch	Military Security Board
Civil Aviation Branch	Office of Political Affairs
German Prisoner of War Section	Office of Political Affairs

Chief of Staff	Abolished
Civil Administration	Office of Political Affairs
Control Office	Office of Administration
Deputy Military Governor and Assistant Deputy Military Governor	Office of United States High Commissioner
Education and Cultural Relations Division	Office of Public Affairs
Finance Division	Office of Economic Affairs
Information Services Division	Office of Public Affairs
Legal Division	Office of General Counsel
Manpower Division	Office of Labor Affairs
Naval Adviser	Transferred to EUCOM
Office of Economics Adviser	
Decartilization and Decentralization Branch	Office of General Counsel
Remaining Branches	Office of Economic Affairs
Office of Finance Adviser	Office of Economic Affairs
Office of Inspector General	Transferred to EUCOM
Office of Intelligence	Office of Intelligence
Office of Political Adviser	Office of Political Affairs
Personnel Office	Office of Administration
Public Information Office	Office of Public Affairs
Secretary General and Staff Secretary	Office of Executive Secretary
United States Elements, Bipartite Control Office and Joint Export-Import Agency	Office of Economic Affairs

* * * * *

Charter of the Allied High Commission for Germany

I

Establishment of Allied High Commission and Transfer of Control

1. An Allied High Commission (hereinafter referred to as the High Commission) is hereby established for the exercise

of supreme Allied authority in the Federal Republic of Germany. The High Commissioner shall be headed by three High Commissioners, one designated by each of the three powers signatory hereto.

2. As from the date of the entry into force of the Occupation Statute all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany, from whatever source derived and however exercised, will be transferred to the three High Commissioners respectively to be exercised in accordance with the provisions hereof and of the Occupation Statute.

3. The forces of occupation of the three powers in Germany shall remain stationed in their respective zones of occupation. Command of the forces of occupation in each zone and control of their related military establishments shall remain with the respective Commanders of the forces of occupation in such zone.

4. Legislation of the Occupation Authorities enacted before the effective date of the Occupation Statute shall remain in force until repealed or amended or otherwise replaced as provided in the Occupation Statute.

II

Functions of the High Commission

1. The High Commission shall exercise control over the Federal Government and the Governments of its constituent Laender (States), as provided in the Occupation Statute. In the exercise of the powers reserved to the Occupation Authorities under said Statute, the High Commission shall reach its decisions in accordance with the provisions of the "Agreement as to Tripartite Controls" among the three powers dated April 8, 1949, and attached hereto and made part of this instrument as Annex A. These decisions shall constitute a joint exercise of the authority of all of the three High Commissioners.

2. The High Commission shall act only through the Federal or appropriate Land (State) Government except

where direct action or legislation by the High Commission is necessary or appropriate for the due exercise of any of the powers reserved to the Occupation Authorities under the Occupation Statute.

3. The Headquarters of the High Commission shall be at the seat of German Federal Government which together with a surrounding area to be defined will constitute a special area directly under the High Commission and excluded from any individual zone of occupation. The necessary special arrangements in connection with the definition and administration of this area in as far as they concern the Allies will be determined subsequently by the High Commission.

Organization of the High Commission

1. The organization of the High Commission at its headquarters shall be tripartite in character and shall consist of:

a. an Allied Council (hereinafter referred to as "the Council") composed of the three High Commissioners. Each High Commissioner shall nominate a Deputy or permanent representative who will take his place on the Council in his absence. The Deputies or permanent representatives of the respective High Commissioners acting together may function as an Executive Committee of the Council if the Council so decides;

b. such committees or bodies as the Council may from time to time establish. These committees and bodies shall advise the Council in their respective spheres and shall exercise such executive functions as the Council may delegate to them. The number, functions, and organization of such committees or bodies may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Subject to the above, in order to ensure continuity of operation, the Council initially shall be assisted by committees, respectively for political affairs, foreign trade and exchange, finance, economics, law, and by the Military Security Board. Each committee shall be assisted by such

associated staff as it may require and as the Council approve;

c. an Allied General Secretariat.

2. The Council.

The Council shall constitute the supreme authority of the High Commission. The Council shall meet as frequently as it considers necessary and at any time upon the request of any of its members. The chairmanship of the Council and its various committees shall be held in monthly rotation by each of its members. The Council shall fix the time and place of its meetings and shall establish appropriate rules and procedures for the conduct of its business. Decisions of the Council shall be reached in accordance with Annex A hereof.

3. Committees.

The composition of each committee and its terms of reference shall be fixed by the Council. Initially, such committees, together with their respective terms of reference, shall be as follows:

a. the Political Affairs Committee, consisting of the Political Advisers to the respective High Commissioners, will be concerned with all political and foreign affairs of the German Federal and Land Governments coming within the competence of the Council;

b. a Foreign Trade and Exchange Committee, consisting of the respective Economic and Finance Advisers of each of the High Commissioners.

(i) the committee shall observe the economic, financial, and foreign trade policies of the German authorities and shall advise the Council if such policies or any action taken or proposed to be taken pursuant thereto is likely to have such adverse effect on the foreign trade or foreign exchange resources of the German Government as is likely to increase its need for external assistance;

(ii) the members of the committee shall automatically be members of the Board of Directors of the Joint Export-Import Agency (hereinafter referred to as

"JEIA") and in conjunction with the other directors shall be charged with the orderly liquidation of JEIA at the earliest practicable date. The committee shall assume any control functions presently exercised by JEIA as may warrant retention when the liquidation of JEIA is completed;

(iii) it is understood that the German Federal Republic will become a party to the convention for European Economic Cooperation and will execute a bilateral agreement with the Government of the United States. It is further understood that thereafter the functions of the High Commission in respect of the matters referred to in (i) will be appropriately modified;

c. the Economics Committee, consisting of the Economics Advisers to the respective High Commissioners, shall observe the general economic policies of the German authorities and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. The Committee shall advise the Council on all matters relating to the decartelization and deconcentration of German industry;

d. the Finance Committee, consisting of the Finance Advisers to the respective High Commissioners, shall observe the general financial policies of the German authorities, and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. To the extent necessary within the limits of the provisions of the Occupation Statute, the Finance Committee shall succeed to and shall assume the functions heretofore exercised by the Allied Bank Commission.

e. the Law Committee, consisting of the Legal Advisers to the respective High Commissioners, shall advise the Council and its committees on all legal and judicial affairs arising out of the work of the High Commission;

f. the Military Security Board shall deal with all matters of demilitarization, disarmament, industrial prohibitions and limitations, and scientific research in accordance with its existing terms of reference.

4. Committee Staffs and Subordinate Groups.

a. within numerical limitations established by the Council, each of the committees designated pursuant to paragraph 3 of this Article III shall establish such tripartite subordinate committees or other groups as may be necessary to the performance of its functions and as the Council may approve;

b. except as specifically otherwise provided in subparagraph c of this paragraph 4, personnel for such subordinate committees or groups shall be appointed by each of the High Commissioners on a basis of parity among the three Allied nations. They may include military personnel. The number, functions, and organizations of such subordinate committees or groups may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Each subordinate committee or group shall be answerable to the committee responsible for its creation and shall report to the Council through such committee. Each subordinate agency shall be physically located at the headquarters of the High Commission except as may be otherwise determined by the Council;

c. the subordinate committees and groups established pursuant to subparagraph a of this paragraph 4 shall include:

- (i) Joint Export-Import Agency which, until liquidated as provided in subparagraph b of paragraph 3 hereof, shall function under its existing terms of reference with an integrated staff and shall report to the Committee on Foreign Trade and Exchange through its Director General who together with the deputy Directors General shall be members of the Board of Directors of JEIA;
- (ii) the Decartelization and Industrial Deconcentration Group, the Coal Control Group, and the Steel Control Group, all of which shall report through the Economics Committee;
- (iii) the Combined Travel Board which shall report through the Political Affairs Committee;

(iv) Civil Aviation Board which shall report as determined by the Council;

63 (v) an Information and Cultural Affairs Sub-Committee which shall report through the Political Affairs Committee;

(vi) a Sub-Committee on Foreign Interests which shall report as determined by the Council.

5. Allied General Secretariat.

The High Commission shall be served by a Tripartite General Secretariat. The Secretariat will receive and dispatch all communications to or from the High Commission, prepare the agenda and materials for the meetings of the Council, and shall keep the minutes of their meetings. The Secretariat or its appropriate branches shall act as the channel of communication between the High Commission and the agencies of the Federal Government, and between the Council and the several Land Commissioners with respect to matters affecting said Land Governments. The Secretariat shall maintain the records of the High Commission and be responsible for such other tasks as the Council may decide.

IV

LAND COMMISSIONERS

1. All powers of the High Commission shall be uniformly exercised in the constituent Laender (States) of the Federal Republic, in accordance with tripartite policies and the directions of the Council.

2. To achieve uniformity in the exercise of its powers, the High Commission shall be represented at the seat of government of each of the constituent Laender by an Allied Land (State) Commissioner who shall be solely responsible to the Council for ensuring due compliance on the part of the Land authorities with the Council's decisions and directives. The Land Commissioner shall report and be solely responsible to the Council for all matters of tripartite concern in the Land and shall be the exclusive channel of com-

munication and liaison between the Council and the Land Government with respect to such matters.

3. In particular each Land Commissioner shall be responsible to the Council for:

(a) initial consideration and prompt transmittal to the Council of Land legislation, together with his recommendations thereon;

(b) observing and ensuring due compliance on the part of the Land Government with the provisions of the Federal and Land Constitutions, the Occupation Statute, and the laws of the Occupation Authorities in force;

(c) providing information as required by the Military Security Board and giving all necessary assistance to the inspectorate of the Military Security Board and such other bodies as may be authorized by the Council;

(d) the preparation of such periodic or special reports as the Council may request.

4. Each Land Commissioner and the members of his staff shall be nationals of the power in whose zone the Land is situated, and shall be appointed by and administratively responsible to the High Commissioner designated by such power. Each Land Commissioner shall be accountable exclusively to his High Commissioner and shall be his channel of communication and liaison with the Land Government with respect to:

(a) all matters which are listed in Article V, paragraph 2;

(b) conduct of all relationships between the forces of occupation stationed in the Land and the governmental agencies thereof except to the extent that direct communications and relations may be authorized by him.

5. Each High Commissioner shall designate an observed together with a small personal staff to be agreed in each case by the High Commissioners concerned,

to each of the Land Commissioners outside of his own zone for purposes of consultation and information.

V

INDIVIDUAL RESPONSIBILITIES OF THE HIGH COMMISSIONERS

1. Each High Commissioner shall maintain at the seat of government of each of the Laender in his zone a Land Commissioner with the minimum staff and facilities required for the purposes set forth in Articles IV and V hereof. He shall ensure the due implementation by each of said Land Commissioners of the decisions and directions of the Council. He shall also ensure that all powers of the High Commission are uniformly exercised within said Laender in accordance with tripartite policy and the decisions of the Council.

2. Each High Commissioner shall be responsible to his Government with respect to the Laender of his zone for the matters in fields reserved to Occupation Authorities listed below. Nevertheless so far as possible, he shall coordinate the general policies which he may pursue in these fields with those of the other High Commissioners and exercise these powers in accordance with such tripartite legislation or policies as the Council may adopt:

(a) maintenance of law and order if the responsible German authorities are unable to do so;

(b) ensuring the protection, prestige, security and immunities of the Allied forces of occupation; of the Allied Occupation Authorities, their dependents, employees and official representatives;

(c) the delivery of reparations and restitutable property;

(d) care and administration of displaced persons;

(e) the disposition of war criminals;

(f) administration of justice in cases falling within the jurisdiction of Allied Courts;

(g) control of the care and treatment in German prisons of persons charged before or sentenced by the

Courts or tribunals of the Occupation Authorities, over the carrying out of sentences imposed on them and over questions of amnesty, pardon or release in relation to them.

3. Each High Commissioner shall be individually responsible for the formulation annually, in accordance with tripartite policies and criteria, of a budget of occupation costs and other requirements within his zone. Such budget shall be formulated and submitted to the Council, on a date to be determined by it, for consideration and approval by the Council and for consolidation in a total budget of the Occupation Authorities for transmission to the German Government. Each High Commissioner shall be responsible to the Council for control of the approved budget for his zone in accordance with accounting standards and procedures established by the Council.

VI

DECISIONS OF THE COUNCIL

1. Formal decisions and directions of the Council affecting the Federal Government or any agency thereof shall be in writing and shall be communicated to the Chancellor by or on behalf of the Council.

2. Formal communications involving matters of lesser import or of a routine character may be addressed to the Minister concerned by the appropriate organ of the Council.

3. Formal decisions or directions of the Council affecting a Land Government or agency thereof shall be in writing and shall be communicated to its Minister President through the Land Commissioner, in the name of the Council.

4. Formal decisions of the Council shall be recorded in an official gazette maintained by the High Commission at the Allied seat of control in Germany which shall be published in the English, French, and German languages. Publication of any such decision in the official gazette of the High Commission shall be conclusive evidence that the recorded action or decision was taken pursuant to the powers vested in the Occupation Authorities under the Occupation Statute.

VII

INTERNATIONAL AUTHORITY FOR THE RUHR

The High Commission shall take all necessary steps to give effect to Article 22 of the Agreement establishing the International Authority for the Ruhr of April 28, 1949.

VIII

FOREIGN MISSIONS IN GERMANY

The necessary liaison with the governments of other nations especially interested will be ensured by the appointment by such governments of appropriate missions to the Council of the High Commission having access, by procedures to be determined, to its subordinate bodies and the German Government.

IX

UNITED NATIONS ORGANIZATIONS IN GERMANY

United Nations organizations and specialized agencies may operate in the Federal Republic of Germany on such terms as may be agreed by the Council.

X

OFFICIAL LANGUAGES

The official languages of the High Commission shall be English and French. Authoritative German texts of documents shall be provided as necessary.

XI

In Witness Whereof the foregoing agreement has been duly executed by the respective representatives thereunto duly authorized of the Governments of the United Kingdom of Great Britain, the United States of America, and the Republic of France, in triplicate in the French and English languages, each text being equally authentic and shall come into effect on the date of the entry into force of the Occupation Statute.

Paris

June 16, 1949

* * * * *

Agreement as to Tripartite Controls

The Governments of the United Kingdom, France, and the United States agree to enter into a Tripartite Fusion Agreement prior to the entry into effect of the Occupation Statute. The representatives of the three Occupying Powers will make the necessary arrangements to establish tripartite control machinery for the Western Zones of Germany, which will become effective at the time of the establishment of a provisional German government. The following provisions agreed by the Governments of the United Kingdom, France, and the United States shall form the basis of these arrangements:

1. An Allied High Commission composed of one High Commissioner of each Occupying Power or his representative shall be the supreme Allied agency of control.

2. The nature and extent of controls exercised by the Allied High Commission shall be in harmony with the Occupation Statute and international agreements.

3. In order to permit the German Federal Republic to exercise increased responsibilities over domestic affairs and to reduce the burden of occupation costs, staff personnel shall be kept to a minimum.

4. In the exercise of the powers reserved to the Occupation Authorities to approve amendments to the Federal Constitution, the decisions of the Allied High Commission shall require unanimous agreement.

5. In cases in which the exercise of (or failure to exercise) the powers reserved under paragraph 2(g) of the Occupation Statute would increase the need for assistance from United States Government appropriated funds, there shall be a system of weighted voting. Under such system the representatives of the Occupation Authorities will have a voting strength proportionate to the funds made available to Germany by their respective Governments. This provision shall not, however, reduce the present United States predominant voice in the Joint Export-Import Agency and Joint Foreign Exchange Agency while these organizations, or any successor organization to them, con-

tinue in existence and are charged with the performance of any of their present functions. No action taken hereunder shall be contrary to any inter-governmental agreement among the signatories or to the principles of non-discrimination.

6. On all other matters action shall be by majority vote.

7. (a) If a majority decision alters or modifies any inter-governmental agreement which relates to any of the subjects listed in paragraph 2 (a) and 2 (b) of the Occupation Statute, any dissenting High Commissioner may appeal to his Government. This appeal shall serve to suspend the decision pending agreement between the three Governments.

(b) If a High Commissioner considers that a majority decision conflicts with any inter-governmental agreement which relates to any of the subjects in paragraph 2 (a) and 2 (b) of the Occupation Statute or with the fundamental principles for the conduct of Germany's external relations or with matters essential to the security, prestige, and requirements of the occupying forces, he may appeal to his Government. Such an appeal shall serve to suspend action for 30 days, and thereafter unless two of the Governments indicate that the grounds do not justify further suspension.

(c) If such appeal is from an action of the Allied High Commission either declining to disapprove or deciding to disapprove German legislation, such legislation shall be provisionally disapproved for the duration of the appeal period.

8. A High Commissioner who considers that a decision made by less than unanimous vote involving any other matter reserved by the Occupation Statute is not in conformity with basic tripartite policies regarding Germany or that a Land (State) constitution, or an amendment thereto, violates the Basic Law, may appeal to his Government. An appeal in this case shall serve to suspend action for a period not to exceed 21 days from the date of the decision unless all three Governments agree otherwise. If such appeal is from an action of the Allied High Commis-

sion either declining to disapprove or deciding to disapprove German legislation, such legislation shall be provisionally disapproved for the duration of the appeal period.

9. All powers of the Allied High Commission shall be uniformly exercised in accordance with tripartite policies and directives. To this end in each Land the Allied High Commission shall be represented by a single Land Commissioner who shall be solely responsible to it for all tripartite affairs. In each Land the Land Commissioner shall be a national of the Allied power in whose Zone the Land is situated. Outside his own Zone each High Commissioner will delegate an observer to each of the Land Commissioners for purposes of consultation and information. Nothing in this paragraph shall be construed to limit the functions of bodies established pursuant to inter-governmental agreement.

10. To the greatest extent possible, all directives and other instruments of control shall be addressed to the Federal and/or Land authorities.

11. The Trizonal Fusion Agreement will continue in force until altered by agreement among the Governments.

Washington, D. C.

April 8, 1949

* * * * *

F-1

United States Civil Service Commission
Washington 25, D. C.

Address only "Civil Service Commission"
In your reply refer to File BAR:JHL:BGL
and date of this letter

Office of Legal Adviser
Department of State
Washington 25, D. C.

October 27, 1950

Dear Sir:

Reference is made to the reduction in force appeals of Messrs. Horace J. Feldman and Meyer L. Cassman, pres-

ently pending before the Commission's Board of Appeals and Review, in which the question has been raised as to whether or not there was an actual transfer of functions to the Department of State from the Department of the Army when the Office of Military Government of the United States was liquidated, and replaced by the Office of the U.S. High Commissioner for Germany.

At the time of the liquidation of the Office of Military Government of the United States, Mr. Feldman was employed as Clerk of the U.S. Military Government Court (10th Judicial District) at Ansbach, Germany. Mr. Cassman was employed as Judge, Office of Military Government of the United States, Board of Review, Nurnberg, Germany. Both these employees, through their attorneys, submitted the attached briefs in connection with their reduction in force appeals. Their contention is that there was an actual transfer of functions within the provisions of Section 12 of the Veterans' Preference Act from the Department of the Army to the Department of State when the Office of Military Government of the United States was replaced by the High Commissioner for Germany, and that they should have been transferred along with the functions to the Department of State.

The two attached briefs are being submitted to your office for whatever comment you may wish to make relative to the matter before a decision is reached by the Commission's Board of Appeals and Review concerning the rights of Messrs. Feldman and Cassman to reassignment to continuing positions in the Department of State. It is requested that the briefs be returned to the Board of Appeals and Review, together with whatever comments you may wish to make, within ten days from the date of receipt of this letter in order that a decision may be reached as promptly as possible.

Very respectfully,

(S.) CHAS. A. ANDERSON,

Chairman Board of Appeals and Review.

Enclosure No. 24258

Filed January 19, 1955, Harry M. Hull, Clerk

103

F-2

In reply refer to
L/A

November 15, 1950

Mr. Charles R. Anderson, Chairman,
Board of Appeals and Review,
Civil Service Commission,
Washington 25, D. C.

My dear Mr. Anderson:

Reference is made to your letter of October 27, 1950 (File BAR: JHL:BGL) relating to the reduction in force appeals of Messrs. Horace J. Feldman and Meyer L. Casman, presently pending before the Commission's Board of Appeals and Review, in which the question has been raised as to whether or not there was an actual transfer of functions to the Department of State from the Department of the Army when the Office of Military Government of the United States was liquidated and the Office of the United States High Commission established. The two briefs submitted for comment are returned herewith.

It is the view of the Department that upon its assumption of responsibilities of the United States in Germany there was not a transfer of functions from the Department of the Army to the Department of State. On September 21, 1949 the Department of State assumed new, extremely complex, functions with respect to United States obligations in Germany. On that date there was established a new government of Western Germany. An Occupation Statute, which had been approved by the governments of the three Western Occupying Powers and which became effective that date, permitted that German Government to exercise full legislative, executive and judicial authority in the three western zones of Germany, except for certain specified fields in which there might be Allied intervention. The Charter of the Allied High Commission, also approved by the three Western Powers, came into effect the same day. Prior to September 21, 1949 United States Military Govern-

ment had exercised governmental authority only in its own zone, whereas under this Charter the United States High Commissioner was only one of three Commissioners who, in most cases, controlled all these zones by a majority vote. To represent the United States on the Allied High Commission and to exercise the responsibilities of the United States in Germany, the President established the position of United States High Commissioner for Germany and placed it under the supervision of the Secretary of State (Executive Order 10062, June 6, 1949). Finally, on September 21, 1949, Military Government, as such, terminated save for liquidating functions which, together with all other military functions, have been carried on since then by the Department of the Army. It is to be noted that Messrs. Feldman and Casman were always carried on Army payrolls, not those of the Department of State, and after September 21, 1949 were part of the Army personnel of the Office of Military Government which was in liquidation.

The source of authority for any United States activity in Germany is the power of the President as Commander in Chief of the armed forces; however, the duties and responsibilities to be exercised by the Department of State through the United States High Commissioner of Germany are those which are defined by the Occupation Statute and the Charter of the Allied High Commission for Germany, and are essentially different from the functions that were either terminated or retained for liquidation or otherwise by the Department of the Army.

In conclusion, it is the Department's opinion that the foregoing facts indicate clear authority to establish the Office of the United States High Commission for Germany and that there was no transfer of functions from the Department of the Army to the Foreign Service of the Department of State. Accordingly, appointments to the staff of the Office of the United States High Commission for Germany were made under the statutory authority of the Secretary of State to appoint Foreign Service personnel,

as set forth in the Foreign Service Act of 1946 (Public Law 724, 79th Congress).

Sincerely yours,

BENEDICT M. ENGLISH,
Acting Deputy Legal Adviser.

Enclosures:

Two briefs (No. 24258).

F-3

105 Filed January 19, 1955. Harry M. Hull, Clerk

United States Civil Service Commission
Washington 25, D. C.

File BAR: JHL: rlb
May 18, 1951

Mr. Benedict M. English
Acting Deputy Legal Adviser
Department of State
Washington 25, D. C.

Dear Mr. English:

Reference is made to your letter dated November 15, 1950, file L/A, relating to the reduction in force appeals of Messrs. Horace J. Feldman and Meyer L. Casman, presently pending before the Commission's Board of Appeals and Review, in which the question has been raised as to whether or not there was an actual transfer of functions to the Department of State from the Department of the Army when the Office of Military Government of the United States was liquidated and the Office of the United States High Commission was established.

In order for the last proviso in Section 12 of the Veterans' Preference Act of 1944 to be applicable it is not necessary that all of the functions of an agency be transferred to some other agency. It is sufficient if any of the functions of an agency are transferred to another agency.

The problem in the instant cases is: Have the functions with which Messrs. Feldman and Casman were connected been transferred to the Department of State? Messrs.

Feldman and Casman in their briefs submitted in support of their appeals have made statements to the effect that the court activities with which they were connected are now being carried on by the High Commissioner under the Department of State. There is nothing found in the record which contradicts these statements.

As you know, Messrs. Feldman and Casman were preference eligible appointees employed under the Department of the Army in Germany as part of the court system. This court system now operates under a high commissioner under the Department of State. Mr. Casman, a former Judge, Board of Review, Nuremburg, Germany, states that all the functions of that Board were transferred to the Department of State but he was not first transferred to that department before other persons were employed in the functions transferred. Mr. Feldman, former Clerk of the United States Military Government Court, 10th Judicial District, Ansbach, Germany, states the functions of the District Court were transferred from the Department of the Army to the Department of State but, although he was a veteran engaged in this function, he was not first transferred to the replacing department before a replacement was hired.

Before final action is taken on the appeals of Messrs. Casman and Feldman it is requested you advise this office at an early date whether or not the functions with which they were connected in the Department of the Army were transferred to the Department of State and if so the reason these two preference eligible appointees were not transferred along with the functions. As soon as this information is received further consideration will be given to their appeals and you will be advised with regard to the decision reached.

Very respectfully,

(S.) CHAS. R. ANDERSON, *Chairman,*
Board of Appeals and Review.

* * * * *

F-4

107 Filed January 19, 1955. Harry M. Hull, Clerk

June 15, 1951

In reply refer to L/A.

Mr. Charles R. Anderson, Chairman,
Board of Appeals and Review,
Civil Service Commission,
Washington 25, D.C.

My dear Mr. Anderson:

Reference is made to your letter of May 18, 1951 (File BAR:JNL:rlb) concerning the reduction in force appeals of Messrs. Horace J. Feldman and Meyer L. Casman, pending before the Commission's Board of Appeals and Review, in which the question has been raised as to whether or not there was an actual transfer of functions to the Department of State from the Department of the Army when the Office of Military Government of the United States was liquidated and the Office of the United States High Commission was established.

The Department's letter to you of November 15, 1950, apparently did not make clear the factual situation which is believed to indicate clearly that there was not a transfer of functions from the Department of the Army to the Department of State. Prior to September 21, 1949, when the Department of State became the responsible Department for administration of affairs in Germany, there had been a Military Government established by and conducted by the military authorities in accordance with international law and practice. The Military Government was first established as our troops entered Germany in each town that was overrun. After hostilities ceased, the local Military Governments were consolidated under the Office of Military Government for Germany (OMGUS), which continued to exercise and directly administer the functions of Military Government. As certain German governmental departments were organized at Land (state) level, the administra-

tion was gradually turned over to the German authorities although full Military Government control of policy and direction was retained. A system of Military Government courts was established and operated by OMGUS. In addition, under OMGUS legislation, an administrative Board of Review was established to consider certain cases arising under a particular Military Government law dealing with restitution of property taken by duress from those persecuted by the Nazis. Mr. Feldman was a clerk of that court system and Mr. Casman was a member of the Board of Review.

On September 21, 1949, a wholly new relationship was established between the United States authorities in Germany and the Germans. In the first place, a Federal Constitution, which had been prepared and ratified by the Germans of the Western Zones, became effective and a Federal Government for the first time was established. Theretofore there had been only state governments, except for a council dealing with certain economic matters of common interest to the British and American Zones. The Federal Government embraced not only the American Zone but the British and French Zones.

In the second place, in lieu of a Military Government where each Military Governor was the supreme authority in his own zone but had no authority in any other zone, there was established an Allied High Commission for the Three Western Zones consisting of representatives of the United States, British and French Governments. The Office of the United States High Commissioner was the United States element of the tripartite High Commission organization. This High Commission, acting by majority vote, dealt in matters pertaining to the three zones, whereas, theretofore, each Military Governor had dealt in all matters pertaining to his Zone alone. By an Occupation Statute which became effective September 21, 1949, the new Federal Government had full legislative, executive and judicial authority in all matters except the few limited fields reserved to the High Commissioner. The fields of Allied action were thus greatly limited. In certain areas

the reserved fields were, by agreement among the Three Western Allies, administered unilaterally by each High Commissioner within his Zone, but the over-all arrangement was a merging of the three zones both on the German side and on the Allied side for purposes of control and administration, coupled with a drastic limitation on the areas of Allied jurisdiction.

The relationship between the High Commission and the new Federal Government was, of course, entirely new since neither had previously existed and also the old unilateral control and authority of the military governments in their own zones were now abolished.

These arrangements, viewed in broad perspective, show that regardless of similarity of operations performed by a particular individual before and after September 21, 1949, there was not a transfer of functions but a wholly new type of functions being performed. For example, it is true, of course, that the Military Governor before September 21, 1949 and the High Commissioner thereafter both required a stenographer, but the question is not to be looked at in such detail but rather whether the functions performed by the Office of the United States High Commissioner for Germany were the same functions as those performed by the Office of Military Government for Germany, or whether they were new functions.

For these reasons it is submitted that, in the case of Mr. Feldman, the mere fact that there was a clerk of court position which he filled before September 21, 1949, and that there was also a clerk of court position thereafter is immaterial. In the case of Mr. Casman, the Office of the United States High Commissioner for Germany never did establish a Board of Review for restitution cases. Instead, it considered that questions arising under the restitution law were of a judicial character and should be handled by a panel of the Court of Appeals of the United States Courts of the Allied High Commission. In both cases the operations after September 21, 1949, were carried on by the Office of the United States High Commissioner as part of a new organization established to deal in a new way and by

majority vote with three Zones instead of one, standing in new relationship to a new German Government, and governed by a new Occupation Statute.

Sincerely yours,

JACK B. TATE,
Deputy Legal Adviser.

F-5

110 **Filed January 19, 1955. Harry M. Hull, Clerk**

Copy

**United States Civil Service Commission
Washington 25, D. C.**

October 5, 1951

Address only "Civil Service Commission". In your reply refer to File BAR:JHL:rlb and date of this letter.

Mr. Hans A. Nathan
Suite 300-311 Denrike Building
1010 Vermont Avenue, N.W.
Washington 5, D.C.

Dear Mr. Nathan:

Further reference is made to the appeals you have entered in behalf of Messrs. Horace J. Feldman and Meyer L. Casman who were separated through reduction in force procedures from their respective positions of Clerk of the Court, with the District Court, Tenth District Office of the Military Government in Germany, and Judge, OMGUS, Board of Review, Nurnberg, Germany.

Subsequent to the hearing, which was held before the Board of Appeals and Review the entire files relative to the appeals of Messrs. Feldman and Casman were forwarded to the Commission for the personal attention of the Commissioners. After careful study of all the pertinent facts, the Commission has made the determination

that the employing agency did not violate any of the retention preference rights of Messrs. Feldman and Casman in effecting their separation. Accordingly, the decision previously reached in their cases has been affirmed.

Since this office does not have the current addresses of Messrs. Feldman and Casman their copies of this decision are enclosed.

By direction of the Commission:

Very respectfully,

(S.) CHAS. R. ANDERSON, *Chairman,*
Board of Appeals and Review.

• • • • •

F-10

112 Filed January 19, 1955. Harry M. Hull, Clerk

United States Civil Service Commission
Washington 25, D. C.

Address only "Civil Service Commission"
In your reply refer to File and date of this letter

December 5, 1952.

Honorable Dean G. Acheson
The Secretary of State

Dear Secretary Acheson:

Reference is made to letter of July 1, 1952, File BAR: JHL:rlb, from the Acting Chairman of the Board of Appeals and Review relative to the reduction in force cases of Messrs. Horace J. Feldman and Meyer L. Casman, which was directed to Mr. P. F. Szluk, Personnel Officer of your German Affairs Branch.

In that letter it was recommended by the Commission that Messrs. Feldman and Casman be restored to active duty retroactively to the day following the last day in a full pay status and in a position of like status and pay in your Department to that from which they were improperly separated in the Department of the Army.

Since that time we have had several informal contacts with representatives of your Department for the purpose of assisting them in placing our recommendation in effect. As of this date, we are informed, however, that our recommendation still has not been complied with.

In order that this matter may be properly closed it is requested that you advise the Commission not later than close of business December 22, 1952 of the corrective action taken or proposed to be taken by your Department in behalf of Messrs. Feldman and Casman.

Sincerely yours,

(S.) ROBERT RAMSPECK,
Chairman.

F-11

113 **Filed January 19, 1955. Harry M. Hull, Clerk**

In reply refer to

L/A

December 22, 1952

The Honorable

Robert Ramspeck, Chairman,

United States Civil Service Commission

My dear Mr. Ramspeck:

Reference is made to your letter of December 5, 1952, which refers to a letter dated July 1, 1952 (file BAR:JHL:rlb) from the Acting Chairman of the Board of Appeals and Review, wherein the Department was advised that the Civil Service Commission recommended that Messrs. Horace J. Feldman and Meyer L. Casman be restored to active duty retroactively to the day following the last day in a full pay status and in a position of like status and pay in the Department to that from which they were improperly separated in the Department of the Army.

The Commission appears to have reached a conclusion, notwithstanding the views of the Department, that the functions of the courts under the Military Government were transferred to the Department of State, or the Military Government insofar as the functions of the courts were concerned were replaced by the Department on September 21, 1949 within the purview of section 12 of the Veterans' Preference Act of 1944, and that consequently the last proviso of section 12 is applicable to these cases and Messrs. Feldman and Casman should have been transferred along with the functions of the courts.

For reasons hereinafter stated the Department has determined that it must respectfully decline to comply with the recommendations. The Department continues to be of the opinion that none of the functions of the courts under the jurisdiction of the Department of the Army were transferred to or replaced by the Department of State. The reasons in support of this position are well known to the Commission as they were set forth in letters dated November 15, 1950 and June 15, 1951 from the Department. To further support this decision reference is made to a formal communication from the Foreign Ministers of France, the United Kingdom, and the United States to the German Parliamentary Council at Bonn wherein it was stated that—

“With the establishment of the German Federal Republic, Military Government, as such, will terminate, and the functions of the Allied Authorities will be divided control functions being exercised by a High Commissioner and military functions by a Commander-in-Chief.”

Thereafter, on September 21, 1949 the German Federal Government was established, the Occupation Statute became effective, Military Government as such terminated, and Allied control in Germany became vested in diplomatic officials of the United States, the United Kingdom, and France, i.e., the Allied High Commission for Germany. The organization of the United States High Commissioner for Germany created at the time came under the Department

of State and the personnel employed were Foreign Service personnel. The political decision of the Foreign Ministers required the termination and liquidation of the military government organizations conducted by the military forces of the three countries. The establishment of an entirely new civilian organization under the respective foreign offices (in the United States, the State Department) was necessary in order that the political significance of the **change might be emphasized** to the maximum extent possible. It is submitted, therefore, that the decision to make this change in our relationship with the Germans and to place all personnel concerned therewith in the Foreign Service under the Secretary of State was a political decision made by the President through the Secretary of State at the Washington Conference of Foreign Ministers pursuant to his authority and responsibilities in the field of foreign relations, and that there is no existing authority of law which permits the Civil Service Commission to question the aforementioned decision, or require the Secretary of State to take action inconsistent with its announced objective.

In the case of *Madsen v. Kinsella* (343 U.S. 341), an American challenged the jurisdiction of an occupation court in Germany to try her for a criminal offense. One of the points which she argued was that after September 21, 1949 military government had terminated and, therefore, the power to establish an occupation court had terminated. The Supreme Court stated in this decision that these occupation courts after September 21, 1949 "derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States Troops. Although the local government was no longer a 'Military Government' it was a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory." The Court thus recognized that there was no longer a military government although there still was a legal basis for establishing occupation courts.

This same point was discussed in the opinion of the United States Court of Appeals for the Fourth Circuit

when this case was before that Court (188 F. 2d 272). The language used by that Court, however, was quite different. It stated: "While military government, under that name, terminated September 21, 1949, the Office of the High Commissioner for Germany took over its functions and exercised the powers and authority of a 'military government', i.e., a government based on a military occupation." The only point at issue was covered by the last half of the above quotation, namely, that the Office of the High Commissioner exercised the power and authority of a government based on a military occupation. The phrase in the quotation that the Office of High Commissioner for Germany had taken over the functions of military government was pure dictum, unnecessary to the decision or to the rationale of the opinion, was not a point argued by either party and, therefore, is not a precedent or authority for the proposition that there had been a transfer of functions. The Government's position on this point in its brief before the Court of Appeals was not that there had been a transfer of functions but rather that "the functions performed by the Office of the United States High Commissioner, a new Department of State organization, in the matters here involved, had the same legal foundation as had similar functions previously performed by the Office of Military Government." (Brief of Appellee, p. 20.)

Executive Order 10062 of June 6, 1949 established the position of United States High Commissioner for Germany and prescribed generally the duties and responsibilities of the High Commissioner. The position of High Commissioner is designated as *Chief of Mission, Class 1, in accordance with the provisions of the Foreign Service Act of 1946*. It is further provided that he shall exercise all the governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany and *the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946, under the immediate supervision of the Secretary of State* (subject, however, to consultation with and ultimate direction by the President).

It was realized that the duties and responsibilities of the High Commissioner, in implementing the United States policy in German, with respect to its future relations with the new German Government, would be extremely varied and complex. It was further realized that the assumption of such responsibilities by the United States in Germany would necessarily entail the acquisition of personnel possessing special skills, abilities, and qualifications paralleling those required in the Foreign Service.

In view of the foregoing, a determination was made that the staffing of such an organization would be pursuant to the authority contained in the Foreign Service Act of 1946 and the regulations issued thereunder.

A careful examination of the Foreign Service Act of 1946 (60 Stat. 999-1040) reveals that the objectives of the Act, as expressly declared by the Congress, are to develop and strengthen the Foreign Service of the United States so as to enable it effectively to serve abroad the interests of the United States; to enable it to adequately fulfill the functions devolving on it by reason of the transfer to the Department of State of functions heretofore performed by other Government agencies; to provide improvements in the recruitment and training of the personnel of the Service; to provide for the temporary appointment or assignment to the Service of representative and outstanding citizens of the United States possessing special skills and abilities; to provide a flexible and comprehensive framework for the direction of the Service in accordance with modern practices in public administration; and *to codify into one Act all provisions of law relating to the administration of the Foreign Service* (section 111).

This Act contains specific provisions regarding the appointment of personnel into the Foreign Service. Appointment of ambassadors, ministers, and Foreign Service officers are by the President, by and with the advice and consent of the Senate (sections 501, 511). Foreign Service Reserve officers are appointed by the Secretary of State under such regulations as he, the Secretary, shall prescribe (sections 521, 522). Foreign Service Staff officers and employees are likewise appointed by the Secretary of State

under such regulations as he may prescribe (section 531).

The whole tenor of the Act shows that it is carefully drawn to give the President and the Secretary of State, in the conduct of foreign relations, absolute discretion in the selection of personnel for the Foreign Service to represent the interests of the United States abroad. In connection therewith, reference is made to the provisions of the Act of May 26, 1949 (63 Stat. 111) which established unequivocally the authority of the Secretary of State to administer the Department and the Foreign Service. The specified purpose of the Act is to make it possible for the Department of State more adequately to fulfill its responsibilities as the staff arm of the Government in the field of foreign affairs. Section 3 of said Act provides that the Secretary of State, notwithstanding the provisions of *any other law*, except where authority is inherent in or vested in the President of the United States, shall administer, coordinate, and direct the Foreign Service of the United States. Section 4 of that Act authorizes the Secretary of State to "promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State."

In view of the broad and exclusive authority granted by law to the Secretary of State, it is the Department's opinion that the Secretary can not be required to appoint Messrs. Feldman and Casman to the Foreign Service, since it cannot be held either (1) that they were ever employees of the High Commissioner's office, or (2) that the new High Commissioner's office at the time of its establishment was required to hire individuals who had previously been separated from the former Military Government staff. Being required to offer such an appointment (which can not really be construed as "restoration to active duty") would abridge the authority of the Secretary of State as granted by law.

I honestly do not believe that the Department can in good conscience pay a sum in the neighborhood of \$40,000 or \$50,000 to individuals who were never employed by the Foreign Service and who performed no work for the De-

partment during the period for which you have recommended payment.

Sincerely yours,

For the Secretary of State:

CARLISLE H. HUMELSINE,
Deputy Under Secretary.

* * * * *

119 OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR
GERMANY

APO 757

Staff Announcement No. 5

21 September 1949.

**Organization and Functions of the United States Courts for
Germany**

I. *Purpose.* The functions and organization of the United States Courts for Germany, as established by Staff Announcement No. 1, are defined in the following paragraphs.

II. *General Statement of Functions.*

1. The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Government Ordinance No. 31) form an independent judicial unit responsible directly to the United States High Commissioner. The integrated system provides for district judges and magistrates at the district court level and for a Chief Judge and associate judges of the Court of Appeals.

2. The United States Courts for Germany shall exercise the review functions set forth in Article 69 of Military Government Law No. 59.

3. For certain purposes, such as the selection of personnel, the planning for personnel requirements, and the sub-

mission of recommendations regarding the revision of legislation, the United States Courts for Germany function in coordination with the Office of General Counsel.

(S.) JOHN J. McCLOY,
U. S. High Commissioner for Germany.

* * * * *

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EXHIBIT I

**Convention on the Settlement of Matters Arising Out of the
War and the Occupation**

THE UNITED STATES OF AMERICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND and the FRENCH REPUBLIC (hereinafter referred to as "the Three Powers"), of the one part, and the FEDERAL REPUBLIC OF GERMANY, of the other part, AGREE AS FOLLOWS:

Chapter One—General Provisions

Article 1

1. The Federal and Land authorities shall have the power, in accordance with their respective competences under the Basic Law of the Federal Republic, to repeal or amend legislation enacted by the Occupation Authorities, except as otherwise provided in the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions listed in Article 8 thereof. Until such repeal or amendment, legislation enacted by the Occupation Authorities shall remain in force. Legislation enacted by the Control Council shall not be subject to repeal or amendment. Legislation by which the provisional boundaries of the Federal Republic have been established, or which is required to be maintained in force by other provisions of the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions, may only be amended or repealed with the consent of the Three Powers.

2. The Three Powers hereby delegate to the Federal Republic the right to deprive of effect within its territory,

after consultation in each case with the Three Powers, all such legislation of the Control Council as is not required to be maintained in force by other provisions of the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions or as shall not have been required to be maintained in force by the Three Powers in the exercise of their rights relating to Berlin and to Germany as a whole, including unification of Germany and a peace settlement, referred to in the Convention on Relations between the Three Powers and the Federal Republic of Germany, as listed in a communication on behalf of the Governments of the Three Powers to the Federal Chancellor bearing the date of the signature of the present Convention.

* * * * *

122 Chapter Three—Internal Restitution

Article 1

This Chapter relates to:

(a) The restitution of identifiable property to victims of Nazi oppression pursuant to the following legislation:

(i) *For the British Zone of Occupation*

Military Government Law No. 59, as amended or supplemented by Ordinances No. 205, 212, 225, 232, 233, 237, 240 and 243 of the United Kingdom High Commissioner, by Notice No. 1 under Ordinance No. 233 and by Regulations No. 1 to 13 inclusive in their last amended versions;

(ii) *For the United States Zone of Occupation*

Military Government Law No. 59, as amended or supplemented by Amendments No. 1 and 2, by Laws No. 3, 4, 5, 12, 13, 14, 21 (as amended) and 30 of the United States High Commissioner and by the regulations issued pursuant thereto;

(iii) *For the French Zone of Occupation*

Ordinance No. 120 of the French Commander-in-Chief, as amended or supplemented by Ordinances No. 156, 186, and 213 of the French Commander-in-Chief and by Ordinances No. 268 and 274 of the French High Commissioner, Order No. 177 under Ordinance No. 120 (as amended) and Ordinance No. 252 of the French High Commissioner as amended by Ordinance No. 255;

(b) The restitution or reallocation of property seized under the National Socialist regime from cooperative societies, trade unions, Charitable organizations and other democratic organizations, pursuant to Control Council Directive No. 50 and to the following legislation:

(i) *For the British Zone*

Military Government Ordinances No. 150 and 159, as amended by Ordinances No. 208 and 227 of the United Kingdom High Commissioner and paragraph 3 of Article 4 of Military Government Ordinance No. 202;

(ii) *For the United States Zone*

Military Government Law No. 58, as amended or supplemented by Supplement No. 1 to Instructions Implementing Military Government Law No. 5 and Control Council Directive No. 50, by Regulation No. 1 pursuant to Military Government Law No. 58 and by Article 2 of Allied High Commission Law No. A-14;

(iii) *For the French Zone*

Ordinance No. 141 of the French Commander-in-Chief;

(c) The blocking, control, administration and final disposal, in accordance with the legislation referred to in sub-paragraphs (a) and (b) of this Article, of the

44 property also referred to in those sub-paragraphs pursuant to SHAEF and Military Government Laws No. 52 (as amended) and the regulations, orders, licenses and instructions issued thereunder, so far as applicable to such property or the proceeds thereof.

Article 2

The Federal Republic hereby acknowledges the need for, and assumes the obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article 1 of this Chapter and the programmes for restitution, and reallocation thereunder provided. The Federal Republic shall entrust a Federal agency with ensuring the fulfilment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law. The following Articles of this Chapter shall not be construed as limiting to the measures therein specified the obligation assumed under this Article.

Article 3

1. Subject to the provisions of Article 6 of this Chapter, the legislation referred to in Article 1 of this Chapter, as amended in paragraph 2 of Article 4 of this Chapter, shall be maintained in force until all claims filed thereunder have been fully dealt with. Moreover, that portion of such legislation as relates to the establishment, rights and continued existence of successor organizations and trust corporations shall be maintained in force until all such organizations and corporations have completed the tasks for which they were created.

2. The Federal Republic may exercise all legislative exercisable by the Three Powers or any of them pursuant to such legislation, in a manner not inconsistent therewith, by means of Federal legislation or of ordinances of the Federal Government.

3. The following administrative powers of the United Kingdom High Commissioner shall be exercisable within the British Zone by the Federal Government:

(a) The powers under Article IV of British Military Government Ordinance No. 159 and Article V of Ordinance No. 150 to approve regulations issued by the General Organizations Claims Commission and the Trades Union Property Claims Commission respectively;

(b) The powers under Article V of Ordinance No. 159 and Article VI of Ordinance No. 150 to issue additional instructions to the two Commissions;

(c) The powers under Article I (as amended) of Ordinance No. 159 and Article II of Ordinance No. 150 to appoint members of the two Commissions.

4. The Federal Republic hereby undertakes to maintain and to augment or supplement in the several Zones of Occupation of the Three Powers, where necessary for the effective carrying out of the programmes referred to in Article 2 of this Chapter, the existing administrative and judicial agencies or organizations which are concerned with:

(a) the blocking, control, administration, unblocking and disposal of property subject to claims under the legislation referred to in Article 1;

(b) the filing, investigation, assessment, adjudication and final settlement of claims under that legislation.

5. The Federal Republic further undertakes:

(a) to afford the Three Powers or their authorized agents access to the administrative and judicial agencies or organizations referred to in paragraph 4 of this Article for the regular observation and inspection of all matters dealt with in this Chapter and to furnish information and produce files and records with respect thereto;

(b) to preserve intact for a period equal to the period prescribed by German law for the preservation of judicial records, and running from the entry into force of the present Convention, all records then existing of judicial or administrative proceedings and other

official activities relating to the matters referred to in paragraph 4 of this Article; and to preserve intact all such records made after the entry into force of the present Convention for such period from the making of such records. The said period shall be curtailed only if the Three Powers shall expressly so consent;

(c) to continue the existing system of reports from the agencies and organizations referred to in subparagraph (a) of this paragraph to the Three Powers or their authorized agencies;

(d) at all times after the entry into force of the present Convention, to apply to non-residents who are successful claimants under the legislation referred to in Article 1 of this Chapter, terms and conditions for the following transactions:

(i) the use and disposal (including the removal from the Federal territory) of property restituted to them, or of property acquired in replacement or with the proceeds thereof, and

(ii) the use and disposal of Deutsche Mark balances resulting from the satisfaction of restitution claims and from the proceeds of the realization of restituted properties including the conversion of such balances into foreign exchange and the transfer abroad of such exchange

which shall be no less favourable than those applicable to them immediately before the entry into force of the present Convention, or than those which may, at the time of the transaction, be applicable to owners of other property who give up their ordinary residence in the Federal territory, whichever are the more favourable.

6. The undertakings of the Federal Republic pursuant to this Article and to Article 2 of this Chapter shall not involve any direct obligation with regard to the establishment of the Restitution Agencies of the Laender, and the agencies of the Laender dealing with the matters referred to in paragraph (c) of Article 1 of this Chapter, and their administrative procedures. However, no changes shall be

made with regard to existing establishments and administrative procedures which would in any way impede or endanger the full and expeditious implementation of the programmes referred to in Article 2.

Article 4

1. The Federal Republic hereby undertakes

(a) subject to paragraph 3 of this Article, to ensure the payment to restitutes of all judgments or awards which have been or hereafter shall be given or made against the former German Reich under the legislation referred to in Article 1 of this Chapter;

(b) to assume forthwith, by appropriate arrangements with the City of Berlin, liability for the payment, on terms corresponding to those set out in this Article, of all judgments and awards against the former German Reich under the internal restitution legislation in force in the Western Sectors of Berlin.

2. The legislation referred to in sub-paragraphs (a) and (b) of Article 1 of this Chapter shall be deemed to be amended so as to provide that judgments or awards based on indebtedness in Reichsmarks of the former Reich for a sum of money (*Geldsummenasprueche*) shall be converted into Deutsche Marks at the rate of ten Reichsmarks for one Deutsche Mark. Judgments or awards for compensation which may be given against the former Reich under the legislation referred to in sub-paragraphs (a) and (b) of Article 1 shall be made in Deutsche Marks assessed in accordance with the general principles of German law applicable to the assessment of compensation as set forth in the German Civil Code.

3. The obligation of the Federal Republic to the Three Powers with respect to money judgments and awards under paragraph 1 of this Article shall be satisfied when such judgments and awards shall have been paid or shall, if the Federal Republic so requests, be considered to have been satisfied when the Federal Republic shall have paid a total of DM 1,500,000,000 thereon. In determining the time and

method of payment of such judgments and awards, the Federal Republic may take into consideration its capacity to pay.

Article 5

Successor organizations and trust corporations appointed pursuant to the legislation referred to in sub-paragraph (a) of Article 1 of this Chapter, whether or not organized under German law, now enjoy immunity from taxation in the Federal Republic. With regard to taxes the proceeds of which accrue exclusively to the Federation, the organizations and corporation shall continue to enjoy this immunity. They shall also be exempt from any exceptional taxes, levies and imposts, the incidence of which is in fact upon capital assets, imposed in whole or in part for the specific purpose of meeting charges arising out of the war, or out of reparation or restitution to any of the United Nations. With regard to taxes the proceeds of which accrue, in whole or in part, to the *Laender*, *Gemeinden* or *Gemeindeverbaende*, the Federal Government will enter into a separate arrangement having in mind the charitable purposes of these organizations and corporations.

Article 6

1. There is hereby established a Supreme Restitution Court to succeed, under the legislation referred to in sub-paragraph (a) of Article 1 of this Chapter:

- (a) The Board of Review for the British Zone;
- (b) The United States Court of Restitution Appeals of the Allied High Commission for Germany for the United States Zone;
- (c) The Higher Court for Restitution (*Cour Supérieure pour les Restitutions*) for the French Zone.

The composition, jurisdiction, powers and duties of the Supreme Restitution Court shall be as prescribed by the Charter of the Supreme Restitution Court annexed to this Chapter.

2. Each Tribunal to which the Supreme Restitution Court

succeeds shall within three months decide those cases in process of final disposition on the entry into force of the present Convention and shall refer to the Supreme Restitution Court all cases not decided at the end of that period. For the purposes of the present Convention, cases which a tribunal, on the entry into force of the present Convention, has not begun to investigate and consider judicially, or has investigated and considered judicially only in regard to matters of procedure, shall not be considered as cases which, on the entry into force of the present Convention, were in process of final disposition.

* * * * *

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ANNEX TO CHAPTER THREE

Chapter of the Supreme Restitution Court

Article 1

1. The Court shall consist of

- (a) the President of the Court,
- (b) the Presidential Council (Praesidium),
- (c) three Divisions (Senate)

2. Each Division shall be composed of at least five justices, a Clerk and registry, with sufficient personnel to carry out its functions effectively.

3. State Counsel may be appointed to any of the Divisions in such manner as the Governments of the Three Powers and the Federal Government may decide. Paragraphs 3, 4 and 5 of Article 2 and paragraphs 1, 4, 5 and 6 of Article 3 of the present Charter shall apply *mutatis mutandis*.

4. A Division shall be dissolved when no further cases remain to be dealt with by it. The terms of office of all its justices shall thereupon terminate. The Court shall be dissolved on the same date as the last active Division is dissolved.

5. The seat of the Court shall be at Herford. The First Division of the Court shall have its seat at Rastatt, the

Second Division at Herford and the Third Division at Nuremberg.

6. The Presidential Council may from time to time with the approval of the Governments of the Three Powers and the Federal Government determine

(a) a new seat for the Court or any of its Divisions,
 (b) the number of justices required by any of the Divisions in addition to those appointed in accordance with Article 2,

(c) the date of dissolution of each of the Divisions,

(d) the establishment of administrative and other nonjudicial staff required by the Court or any of its Divisions, so far as this is not provided for in the present Charter.

7. Without prejudice to the provisions of paragraph 6, the Presidential Council shall render annual reports to the Governments of the Three Powers and the Federal Government setting forth its requirements for judicial and other personnel for the twelve months next following the date of the report. The first report shall be rendered between the fourteenth and seventeenth month after the entry into force of the present Charter.

Article 2

1. The five justices referred to in paragraph 2 of Article 1 shall be appointed as follows:

(a) Two justices appointed by the Government of the French Republic in the case of the First Division; two by the Government of the United Kingdom in the case of the Second Division; and two by the Government of the United States in the case of the Third Division;

(b) Two justices appointed by the Federal Government;

(c) One justice who shall be neither a national of any of the Three Powers nor a German national, and who shall be appointed by agreement between the Government of the Power designated in sub-paragraph (a) of

this paragraph to appoint justices to the Division concerned (hereinafter referred to as "the Power concerned") and the Federal Government, or failing such agreement, by the President of the International Court of Justice.

2. The Governments of the Three Powers and the Federal Government shall make known their first appointments pursuant to paragraph 1 of this Article not later than the date of entry into force of the present Charter. By the same date the Power concerned and the Federal Government shall agree upon the justice referred to in sub-paragraph (c) of paragraph 1. If he has not been appointed within one month after that date, either the Power concerned or the Federal Government may request the President of the International Court of Justice to appoint him. The provisions of the preceding sentence shall also apply if the Power concerned and the Federal Government fail to agree on the appointment of an additional justice who is not to be appointed unilaterally by the Power concerned or the Federal Government, within one month after approval of a decision of the Presidential Council under subparagraph (b) of paragraph 6 of Article 1 of the present Charter that such an additional justice is required.

3. The justices appointed by the Governments of the Three Powers shall be qualified in accordance with the legislation referred to in Article 1 of the foregoing Chapter. The justices appointed by the Federal Government shall be qualified for judicial office in a Land of the Federal Republic. The other justices shall have the qualifications required in the country of which they are nationals or residents for appointment to judicial office or equivalent qualifications.

4. The Presidential Council may declare a vacancy for a justice if, in its opinion, a justice has, without reasonable excuse, failed

(a) to attend a meeting for which he has been duly designated or

(b) otherwise to perform his duties diligently.

5. The appointment to fill a vacancy created by the expiration of the term of office, death, resignation, or removal from office in accordance with the preceding paragraph of a justice shall be made in the same manner as his appointment within one month of the vacancy occurring.

Article 3

1. Subject to the provisions of paragraph 4 of Article 1 of the present Charter, all justices shall be appointed in the first instance for a period of two years and their terms of office may be renewed thereafter for successive periods of one year. At least six months' notice in writing shall be given to a justice of intention not to renew his term of office. A justice appointed by the Government of one of the Three Powers shall be notified of such intention by the Power concerned, a justice appointed by the Federal Government shall be notified of such intention by it, and a justice appointed by the Government of one of the Three Powers and the Federal Government jointly or by the President of the International Court of Justice shall be notified of such intention by the Power concerned and the Federal Government. In the absence of notice, a justice shall continue in office for a period of one year.

2. Any justice may at any time resign his office. But he shall continue in office until his successor has taken office.

3. No justice may be dismissed from office, except in accordance with paragraph 4 or article 2 of the present Charter.

4. No justice shall be assigned to any non-judicial function, engage in any activity incompatible with the exercise of his duties, or participate in the adjudication of any claim with which he has been previously concerned in any capacity, except as a member of a tribunal to which the Court succeeds, or in which he has a direct interest. Differences of opinion regarding the applicability of this paragraph shall be resolved by the appropriate Division in accordance with Article 8 of the present Charter.

5. (a) Every justice shall, during his term of office, have the rank of an equivalent member of the Federal

Supreme Court and shall, both during and after his term of office, enjoy immunity from suit in respect of acts performed by him in the exercise of his official duties.

(b) A justice who is not a German national shall, during his term of office, enjoy in the Federal territory the same privileges and immunities as are accorded members of diplomatic missions.

6. Each justice shall, before taking office, make a declaration at a public session that he will exercise his duties impartially and conscientiously.

Article 4

1. Each Division shall be presided over by the justice appointed pursuant to sub-paragraph (c) of paragraph 1 of Article 2 of the present Charter. When he is unable to act, he shall be replaced by a deputy designated by the Presidential Council from the justices not appointed unilaterally by the Power concerned or the Federal Government.

2. The presiding justice or his deputy shall preside at all sittings of his Division, shall fix the time of the sittings, shall determine how the business of the Division shall be divided between its justices and shall be generally responsible for its administration.

Article 5

1. The presiding justice of the First Division shall act as President of the Court for the remainder of the calendar month in which the present Charter enters into force and for the four full calendar months next following. Therefore, the presiding justice of each Division in his turn shall so act for four calendar months at a time.

2. The Presidential Council shall consist of the following nine persons:

(a) The President of the Court and the other two presiding justices of Divisions, or their respective deputies;

(b) A justice from each Division or his deputy designated by the Power concerned;

(c) A justice from each Division or his deputy designated by the Federal Government.

3. The Council shall decide by a majority vote of the nine members, except in cases arising under paragraph 4 of Article 2 of the present Charter, when a two-thirds majority will be necessary.

4. The Council shall meet at the seat of the Court at such times as the President shall decide.

5. The Council shall be competent

(a) to consider, at the request of any of its members, questions which are of common interest to more than one Division and to inform the presiding justices of the Divisions accordingly;

(b) to decide concerning the interpretation or application of the present Charter, or concerning any other matters assigned to its competence by the present Charter;

(c) to exercise the following powers conferred by the legislation referred to in Article 1 of the foregoing Chapter;

(i) the power of the Principal Legal Adviser, under Article 5 of Regulation No. 6 under British Military Government Law No. 59, to approve rules of procedure; and

(ii) the powers of the United Kingdom High Commissioner, under paragraph 8 of Article 2 and paragraph 4 of Article 3 of Regulation No. 8, as amended by Regulation No. 11, under British Military Government Law No. 59, to approve rules of procedure; and, under his Ordinance No. 233, to approve agencies by notice.

6. The Presidential Council shall appoint the Court Clerks nominated under paragraph 1 of Article 6 of the present Charter, but they shall be directly and exclusively responsible to the presiding justices of the Divisions to which they

are appointed. The Presidential Council may also appoint its own administrative staff, which shall be subject to the control of the President of the Court and may be nominated by the Federal Government if the Presidential Council so desires.

7. The Council may determine its own rules of procedure.

Article 6

1. The Court Clerks shall be nominated as follows:

- (a) The Clerk of the First Division, by Government of the French Republic;
- (b) The Clerk of the Second Division by the Government of the United Kingdom;
- (c) The Clerk of the Third Division, by the Government of the United States.

2. Each Court Clerk shall have the same powers and duties as the Clerk or Secretary of the tribunal to which his Division succeeds and such additional duties as shall be assigned to him by the presiding justice of that Division.

3. Paragraphs 3, 4 and 5 of Article 2 and paragraphs 4 and 5 of Article 3 of the present Charter shall apply *mutatis mutandis* to the Court Clerks.

Article 7

1. The Federal Republic shall maintain at its own cost and expense the existing facilities and accommodations in use by the tribunals to which the Court succeeds and shall provide such additional facilities and accommodations as the Court may, according to a decision of the Presidential Council, from time to time require.

2. (a) The salaries and allowances of the judicial, administrative and other staff of the Court which is nominated, appointed, or employed by the Government of any of the Three Powers shall be fixed and paid by that Power in consultation with the Federal Govern-

ment. Such salaries and allowances shall be reimbursed to that Power by the Federal Republic.

(b) The salaries and allowances of the judicial, administrative and other staff which are nominated, appointed or employed by the Federal Government shall be fixed by the Federal Government, in consultation with the Power concerned, and paid by the Federal Republic.

(c) The salaries and allowances of justices who are not appointed unilaterally by the Power concerned or the Federal Government shall be fixed by agreement between the Governments of the Three Powers and the Federal Government and paid by the Federal Republic.

3. All persons referred to in sub-paragraphs (a) and (b) of paragraph 2 of this Article shall be subject to the administrative and disciplinary control of the appointing, nominating or employing Government, so far as such a control is not inconsistent with the present Charter.

Article 8

1. All matters shall be adjudicated by five justices of the appropriate division, of whom one shall be the President or his deputy, two shall be justices appointed by the Power concerned, and two shall be justices appointed by the Federal Government.

2. Decisions of the Division shall be given by majority vote and shall be final subject only to the provisions of paragraph 3 of Article 9 of the present Charter.

52 3. The public shall be admitted to all formal hearings (muendliche Verhandlungen).

4. The deliberations of the Presidential Council and of the Divisions shall be secret.

Article 9

1. The Court shall exercise powers and jurisdiction through its Divisions as follows:

(a) The First Division shall exercise the powers and jurisdiction of the Higher Restitution Court established by Ordinance No. 252 of the French High Commissioner;

(b) The Second Division shall exercise the powers and jurisdiction of the Board of Review established by Regulation No. 6 under British Military Government Law No. 59;

(c) The Third Division shall exercise the powers and jurisdiction of the Court of Restitution Appeals established by Law No. 21 (as amended) of the United States High Commissioner.

2. The legislation referred to in Article 1 of the foregoing Chapter shall accordingly be construed and applied by substituting the First Division for the Higher Restitution Court in legislation applicable in the French Zone, the Second Division for the Board of Review in legislation applicable in the British Zone, and the Third Division for the Court of Restitution Appeals in legislation applicable in the United States Zone.

3. Decisions of the Arbitration Tribunal pursuant to paragraph 2 of Article 9 of the Charter of the Arbitration Tribunal referred to in Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany and the provisions of Article 10 of that Charter shall be binding on the Court and on all German courts and authorities, so far as those decisions and provisions concern the extent of the jurisdiction of the Court.

Article 10

1. The official languages of the Presidential Council shall be French, English and German.

2. Otherwise, the official languages of the Court shall be,

(a) for the First Division, French and German;

(b) for the Second and Third Divisions, English and German.

* * * * *

CHAPTER FOUR—COMPENSATION FOR VICTIMS OF NAZI PERSECUTION

1. The Federal Republic acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard to human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

2. In the discharge of this obligation, the Federal Republic undertakes

(a) that legislation in this field in the Federal territory shall in the future be not less favourable to claimants than the legislation now in force;

(b) that, furthermore, there shall be enacted expeditiously legislation supplementing and amending the legislation now in force in the various Laender which shall, subject to the provisions of sub-paragraph (a) of this paragraph, afford a basis throughout the Federal territory for compensation no less favourable than is afforded in the legislation now in force in the Laender of the United States Zone;

(c) that the legislation referred to in sub-paragraph (b) of this paragraph shall adequately take into account the special conditions arising from the persecution itself, including the loss and destruction of records and documents resulting from the conditions of the persecution or the acts of the persecuting agencies and the death or disappearance of witnesses and of persecuted persons as a result of the persecution;

(d) that the effective and expeditious processing, determination and satisfaction of claims for compensation in this field shall be assured without discrimina-

tion against any groups or classes of persecuted persons;

(e) that in all cases where a claim for compensation submitted to the competent authorities has been disallowed under the legislation then in force, but where such a claim would be admissible under supplementary or replacement legislation enacted in accordance with sub-paragraph (b) of this paragraph, the persecuted person shall be assured the possibility of submitting again his claim in spite of the previous rejection thereof;

(f) that the provision of funds adequate to meet all claims under the legislation referred to in sub-paragraphs (a) and (b) of this paragraph shall be ensured by the Federal Republic in accordance with paragraph 3 of this Chapter.

3. The capacity to pay of the Federal Republic may be taken into consideration in determining the time and method of compensation payments under paragraph 1 of this Chapter and in providing adequate funds under sub-paragraph (f) of paragraph 2.

4. The Federal Republic undertakes

(a) insofar as non-German nationals or non-residents of the Federal territory are involved, to afford adequate opportunities to the Three Powers or their authorized agents for the observation of all matters dealt with in this Chapter; and

(b) to preserve intact for a period equal to the period prescribed by German law for the preservation of judicial records, and running from the entry into force of the present Convention, all records then existing of judicial or administrative proceedings and other official activities relating to the matters referred to in this Chapter; and to preserve intact all such records made after the entry into force of the present Convention for such period from the making of such records. The said period shall be curtailed only if the Three Powers shall expressly so consent.

BRIEF AND APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12776

JOHN FOSTER DULLES, SECRETARY OF STATE, APPELLANT

v.

MEYER L. CASMAN, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

DEC 28 1955

Joseph W. Stewart

CLERK

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court erred in giving Section 12 of the Veterans' Preference Act mandatory effect with respect to purely executive positions in the Occupation Government of Germany.

2. Whether the District Court erred in concluding that the Civil Service Commission had jurisdiction over Foreign Service positions in the Occupation Government of Germany, since the Foreign Service Act of 1946 vested exclusive jurisdiction over such positions in the Secretary of State.

3. Whether the District Court erred in concluding that Section 12 of the Veterans' Preference Act was violated, since no findings were made with respect to appellee's qualifications or the hiring of additional personnel for the position appellee sought.

4. Whether the District Court erred in concluding that there had been a transfer of functions, as required by Section 12 of the Veterans' Preference Act, between the Board of Review under OMGUS and the Court of Restitution Appeals Under HICOG.

5. Whether the case should be dismissed since neither agency involved is any longer in existence and only the Court of Claims has jurisdiction over the sole remaining issue as to back pay.

(1)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12776

JOHN FOSTER DULLES, SECRETARY OF STATE, APPELLANT

v.

MEYER L. CASMAN, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the defendant below, John Foster Dulles, Secretary of State, from an order of the District Court (Holtzoff, J.) granting plaintiff-appellee's motion for summary judgment and denying defendant-appellant's cross motion for summary judgment (J. A. 20). The District Court entered its order on March 31, 1955, and appellant's notice of appeal was filed on May 26, 1955. This Court has jurisdiction of the appeal under 28 U. S. C. § 1291 (1952).

STATEMENT OF THE CASE

I

Statement of the facts

Introduction

Briefly stated, this case involves a former employee of the Department of the Army who seeks appointment to a position which was in the Foreign Service of the United States. In

1947, during the period of the military occupation of Germany, appellee was assigned by the Department of the Army to the legal staff of the Military Government of the United States in Germany (OMGUS). On November 3, 1948, he was designated by the Military Governor of Germany to serve as a member of a "Board of Review" established under the Military Government to review cases involving restitution of property to victims of Nazi oppression.

In 1949, in accordance with the terms of certain international agreements concluded by the Allied powers, the military government in Germany was terminated, the Government of the Federal Republic of Germany assumed certain authority formerly exercised by the Allied powers, and all United States authority, except command of troops, was placed under civilian control. On September 21, 1949, the Military Governor was succeeded by a United States High Commissioner for Germany. Following the termination of the Military Government, the civilian employees of the Army in OMGUS were separated. The Office of the High Commissioner for Germany (HICOG) was staffed by Foreign Service officers and employees employed under Foreign Service laws and regulations. After a period for liquidation, the "Board of Review", of which appellee was a member, was abolished and appellee's employment was terminated by the Army. Subsequently the High Commissioner created a "Court of Restitution Appeals" as part of the new United States Court of the Allied High Commission for Germany to exercise powers with respect to restitution cases.

In 1950 appellee appealed his separation by the Army to the Civil Service Commission alleging that this discharge violated the Veterans' Preference Act. In its initial decision, the Commission held that none of appellee's rights had been violated. Later the Commission reversed itself and recommended that appellee be restored to duty in a position of like status and pay in the Department of State as that from which he was separated in the Department of the Army. The Department of State respectfully declined to comply with the recommendation of the Civil Service Commission on the grounds, among others, that the Commission acted without jurisdiction and that the Veterans' Preference Act was not violated. There-

upon, appellee brought the present suit against the Secretary of State.

The facts are set forth in detail below.

A. Occupation of Germany and establishment of Military Government

By early May, 1945, the ground forces of Germany which were still fighting had been pushed back into the boundaries of Germany and the resistance of the German army, navy, and air forces was collapsing. As the Allied troops entered Germany the field commanders of the allied forces, under the Supreme Commander, General Eisenhower, established a Military Government in each town that was overrun. After hostilities ceased, these local Military Governments were consolidated under the Office of Military Government for Germany, and General Eisenhower assumed complete legislative, judicial, and executive authority as Military Governor of the conquered territory. In June 1945 the Berlin Declaration of the Allies announced the unconditional surrender of all German forces. The President, as Commander-in-Chief of the Army and Navy, then formally established through the Commanding General of the United States Forces in the European Theatre, the United States Military Government for Germany within the United States area of control (OMGUS). Military Government Courts, in the nature of military commissions, by that time were a part of the Military Government.¹

B. Appellee's employment by the Army and assignment to the Office of Military Government for Germany (OMGUS)

On May 21, 1947, appellee was employed by the Army as an Attorney, and was assigned to the Office of Chief Counsel for the Office of Military Government of the United States in Germany (OMGUS) (J. A. 17, 25). The appointment was

¹ The facts related above are adopted from the opinion in *Madsen v. Kinsella*, 343 U. S. 341, 356 (1952); from the correspondence with the Civil Service Commission which is part of the record in this case (J. A. 98-99); and from two articles entitled Fahy, *Legal Problems of German Occupation*, 47 Mich. L. Rev. 11-12 (1948), and Nobleman, *American Military Government Courts in Germany*, 40 Amer. Journal of Inter. Law 803 (1946). The facts relate to historical incidents of which the Court of course may take judicial notice.

made under Schedule A of the Civil Service Rules and Regulations by the Corps of Engineers, United States Engineer District, Philadelphia, Pennsylvania, through the Commander-in-Chief of the European Command (J. A. 25).

On November 10, 1947, while appellee was with the Office of Chief Counsel, the United States Military Governor for Germany promulgated Military Government Law No. 59 relating to restitution of identifiable property to victims of Nazi oppression (J. A. 37-46). Article 69 of Military Government Law No. 59 authorized the creation of a "Board of Review" with authority to review decision on restitution claims (J. A. 44). On August 10, 1948, Regulation No. 4 under Military Government Law No. 59 was issued providing for the actual establishment of the Board of Review (J. A. 47-50). Under Regulation No. 4, the Board was to consist of four members to be designated by the Military Governor for a term of not less than one year (J. A. 47). These members were subject to removal from the Board by the Military Governor for reasons of health or "for other good reasons." (J. A. 47).

On November 3, 1948, appellee was designated by the Military Governor to serve as a member of the Board of Review (J. A. 35). He was attached for administrative purposes to the office of the Secretary General for Courts Administration under OMGUS and was graded GS-15 (J. A. 18, 30). During his tenure on the Board of Review, his performance ratings were either excellent or very good (J. A. 18).

C. The establishment of the Office of the United States High Commissioner for Germany (HICOG) and appellee's separation from service by the Army

On May 12, 1949, after agreement among the foreign ministers of the United States, United Kingdom, and France, an Occupation Statute for the Western Zone of Germany was promulgated by the Occupation powers providing for the termination of the Military Government in Germany and defining anew the relations between Germany and the occupation authorities (J. A. 51-54). Thereafter, on June 6, 1949, the President of the United States issued Executive Order No. 10062 establishing the position of United States High Commissioner for Germany (J. A. 74-75). The High Commissioner was to

be the supreme United States authority in Germany and was given authority under the immediate supervision of the Secretary of State to exercise all of the governmental functions of the United States in Germany other than the command of troops (J. A. 74). On June 16, 1949, the representatives of the United States, United Kingdom and France proclaimed a Charter of the Allied High Commission for Germany, establishing the Allied High Commission for Germany as the Supreme Allied authority in Germany (J. A. 79-89). The Charter specifically reserved to the individual occupying powers the administration of justice in cases falling within the jurisdiction of the Allied courts and the delivery or restoration of restitutable property (J. A. 87).

The Occupation Statute was declared to be in force on September 21, 1949, and on that date HICOG was officially established (J. A. 50-51, 70). Effective on this date, all the authority and power residing in the Military Governor and the Office of Military Government for Germany (OMGUS) were assumed by the High Commissioner and the Office of the High Commissioner for Germany (HICOG) (J. A. 70-71).

On August 13, 1949, after the Occupation Statute and Executive Order No. 10062 were promulgated, and approximately one month before HICOG actually was established, OMGUS promulgated General Order No. 38 placing OMGUS in liquidation status effective August 15, 1949 (See J. A. 35-36). Appellee was personally notified on October 3, 1949, by the Army that his active duty status would be terminated on November 3, 1949, unless there was further need for his services in connection with the liquidation of OMGUS (J. A. 35-37). The notification of personnel action subsequently sent to appellee stated expressly as the reason for his separation: "termination resulting from total liquidation of OMGUS pursuant to OMGUS General Order No. 38, 15 August 1949" (J. A. 30). The effective termination date later was changed to December 6, 1949, on which day appellee actually returned to the United States (J. A. 19).

Not one restitution case was disposed of on the merits by the Board of Review during its entire existence.²

² See *Holzhueter v. Schuetz*, 1 Ct. of Res. Appls. 1, 3 (1950).

D. Employment of foreign service personnel and organization of HICOG Court of Restitution Appeals

Executive Order No. 10062, which established the position of United States High Commissioner for Germany, stated that the President was acting by virtue of the authority vested in him "by the Constitution and the Statutes including the Foreign Service Act of 1946 (60 Stat. 999), and as President of the United States and Commander in Chief of the Armed Forces of the United States" (J. A. 74). The High Commissioner was designated as Chief of Mission, Class 1, in accordance with the provisions of the Foreign Service Act of 1946. He was given authority "under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President) to exercise all of the governmental functions of the United States in Germany . . ." All other civilian employees in the High Commissioner's office also were in the Foreign Service holding either staff, reserve, or officer ranks at various grades (J. A. 95-96).

HICOG procedures and policies with respect to restitution of identifiable property to victims of the Nazi oppression, were given specific consideration in several laws promulgated by the High Commissioner. HICOG Law No. 2 issued on December 28, 1949, stated that "the United States Courts of the Allied High Commission for Germany shall have jurisdiction to review any decision on any claim for restitution . . ." with the High Commissioner to provide by regulation for the establishment of a standing panel of the United States Courts for the Allied High Commission to exercise jurisdiction in such cases as a Court of Restitution Appeals (J. A. 56). HICOG Regulation No. 7 established the Court of Restitution Appeals authorized by HICOG Law No. 2 (J. A. 57). This court was to consist of not less than three members to be assigned from the judiciary of the United States Courts of the Allied High Commission for Germany, with one of the judges being designated to serve as its president (J. A. 57). HICOG Law No. 7 further defined the jurisdiction of the new Court of Restitution Appeals (J. A. 57-61).

Finally, on May 24, 1951, HICOG Law No. 21 was issued describing in detail the organization and jurisdiction of the

Court of Restitution Appeals (J. A. 62). Article 7 of Law No. 21 provided that the justices of the court were to be appointed by the High Commissioner and were to hold office "subject to Foreign Service Acts and regulations." (J. A. 68). Further, Article 6 of Law No. 21 authorized assignment to the court of associate judges of the United States Courts of Appeals under HICOG to sit as justices of the Court of Restitution Appeals (J. A. 67-68). HICOG Law No. 21 specifically repealed Article 69 of OMGUS Law No. 59 and all other previous regulations and amendments dealing with the Board of Review and the Court of Restitution Appeals (J. A. 68-69).

E. Termination of the occupation and establishment of the Supreme Restitution Court

The termination of the Allied occupation of Western Germany and the abolition of the Allied High Commission occurred on May 5, 1955, upon the entry into effect of the so-called Bonn Agreements of 1952 as amended by the Paris Protocol of 1954. See Senate Doc. No. 11, 84th Cong., 1st Sess. 4 (1955). These agreements restored to the Federal Republic of Germany the full authority of a sovereign state over its internal and external affairs. *Ibid.*

Article 8 of the Convention On Relations Between The Three Powers And The Federal Republic of Germany, one of the Bonn Agreements, recited that the Signatory States had concluded certain related "Conventions", one of which was the "Convention on the Settlement of Matters Arising Out of the War and the Occupation." *Id.* at 87. In addition to such agencies as the Federal Republic was to establish for such cases, the Convention provided for establishment of a Supreme Restitution Court, the Third Division of which was to exercise the powers and jurisdiction of the Court of Restitution Appeals. *Id.* at 89.

The Court of Restitution Appeals was required within three months to decide those cases in process of final disposition on the entry into force of the Convention and to refer to the Supreme Restitution Court all cases not decided at the end of that period. *Id.* at 89. Since the Convention entered into force on May 5, 1955, the Court of Restitution Appeals was

required on August 5, 1955, to transfer all of its undecided cases to the Supreme Restitution Court and it then went out of existence.

The Charter of the Supreme Restitution Court appears as an annex to Chapter III of the Convention. *Id.* at 90. The Charter provided that the Third Division of the Court, which succeeded the United States Court of Restitution Appeals, was to consist of two justices appointed by the United States, two by the Federal Republic of Germany, and one from a neutral country appointed by agreement of the United States and Germany. *Id.* at 90-91. These five justices were so appointed on August 5, 1955, when the Third Division of the Supreme Restitution Court came into existence.

All the justices of the Supreme Restitution Court were appointed for a two year term of office renewable thereafter for successive periods of one year. *Id.* at 91. During their terms of office the justices are accorded the same privileges and immunities as are accorded members of diplomatic missions, and have the rank of an equivalent member of the German Federal Supreme Court. *Id.* at 92.

Under the Convention the Federal Government of Germany maintains at its own cost and expense the existing facilities and accommodations of the predecessor courts, but the salaries and allowances of the staff are paid by the appointing Government in consultation with the Federal Republic, and the Federal Republic then reimburses the Government involved. *Id.* at 93-94. All justices and other staff members are subject to the administration and disciplinary control of the appointing Government, so far as such control is not inconsistent with the Charter. *Id.* at 94.

Restitution matters in Germany are now handled exclusively by the Federal Republic and the Supreme Restitution Court. No United States tribunal exists in Germany today dealing with such cases.

II

The decision below

The District Judge, in a written opinion, held that the Veterans' Preference Act was applicable to positions in the Occu-

pation Government of Germany. The court concluded that the "functions" which appellee had been performing as a member of the OMGUS Board of Review, devolved upon the HICOG Court of Restitution Appeals after the establishment of HICOG. The Veterans' Preference Act was interpreted as requiring, under such circumstances, the retention of appellee in the service. The order of the court required appellee's restoration and reinstatement retroactively to duty as Judge of the Board of Review, OMGUS, from December 7, to December 31, 1949, and as Judge of the Court of Restitution Appeals, HICOG, from and after January 1, 1950. (J. A. 20-24.)

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in an Appendix to this brief, *infra* 47-68.

SUMMARY OF ARGUMENT

Appellant's position is that the District Court erred in concluding that the Veterans' Preference Act deprived the Executive of all discretion in respect to appointment or retention of appellee in a Foreign Service position with the Occupation Government of Germany. In appellant's view, the Veterans' Preference Act, if applicable at all to such positions, must be construed as recommendatory or directory and not mandatory. Such a construction of the Act with reference to the position involved in this case is reasonable and is required to avoid serious constitutional questions. These constitutional questions relate to the power of Congress to deprive the Executive of all discretion with respect to appointment and retention of an employee in a foreign occupation government or in the Foreign Service. Congress did not intend so to restrict the Executive's power, and the District Court's decision to the contrary has unnecessarily presented the questions of constitutional significance.

In appellant's view the Civil Service Commission had no jurisdiction to order the Secretary of State to appoint appellee to a position in the Foreign Service. The Foreign Service Act and regulations vest exclusive control over such appointments in the Secretary of State. The Foreign Service Act of 1946, in particular, clearly supersedes any otherwise applicable pro-

visions of the earlier Veterans' Preference Act, and confirms the view that discretion resides in the Executive with respect to all such appointments or removals. In any event, the Secretary of State reasonably concluded that the provisions of the Veterans' Preference Act were not violated because there was no transfer of functions from the OMGUS Board of Review to the HICOG Court of Restitution Appeals, and because appellee failed to show either that he was qualified for appointment to a position in the Foreign Service or that HICOG appointed additional employees to the Court of Restitution Appeals from any other source. For these reasons as well, the Secretary's conduct could not be controlled by mandamus.

At the time of the District Court's order, the OMGUS Board of Review was no longer in existence. During the pendency of this appeal, the HICOG Court of Restitution Appeals likewise has ceased to exist. The only tribunal now in existence which could conceivably be compared to either is the Supreme Restitution Court, an international tribunal to which appellee has never suggested that he would be entitled to appointment. Under these circumstances, it is clear that the questions raised in this case have practical significance only with respect to back pay for a past period of employment; no question of future reinstatement is before the Court. In view of this situation the only court with jurisdiction over this case is the Court of Claims, and for this reason the case must be remanded to the District Court with directions to dismiss the complaint.

ARGUMENT

I

The District Court erred in concluding that the Veterans' Preference Act deprived the Executive of all discretion in respect to appointment or retention of appellee, since the Veterans' Preference Act, if applicable to positions in the Occupation Government of Germany, must be construed as directory and not mandatory

A. The District Court's view fails to recognize the Executive's discretionary power under the Constitution to remove purely executive employees

The District Court held that the Executive had no discretion to remove appellee from his position on the Board of

Review or to refuse to appoint him to a Foreign Service position on the Court of Restitution Appeals. These positions were not created by any Congressional enactment. Rather they came into existence as a result of Executive action under the President's constitutional authority as Commander-in-Chief of the Army and Navy and in implementation of his powers with respect to the conduct of our foreign relations. The positions were, therefore, purely executive in nature. *Myers v. United States*, 272 U. S. 52 (1926), and *Humphrey's v. United States*, 295 U. S. 602 (1935), establish that the validity of legislative limitations on the Executive's power of removal depends upon the nature of the position involved, and that Congress cannot deprive the Executive of discretion with respect to the removal of employees in positions of a purely executive character. It is submitted that the District Court erred in giving such effect to the enactment involved here.

In the *Myers* case the statute required Senate approval before the President could remove Postmasters. The Supreme Court held that the statute was an unconstitutional limitation on the President's power of removal. The opinion of the Court by Chief Justice Taft describes extensively the Constitutional history of the removal power, and reviews the reasons advanced by James Madison and his associates during the "Great Debate of 1789" for their conclusion that the Constitution places the removal power in the Executive. Briefly summarized these reasons, insofar as pertinent, are as follows:

1. The Constitution provides in the first section of Article II that "the executive Power shall be vested in the President. . . ." This is essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. The reasonable implication must be therefore "that as [the President's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." *Id.*, 272 U. S. at 115-118.

2. The conclusion that the grant of executive power to the President in the first section of Article II of the Constitution

carried with it the power of removal, is enforced by the grant to the President of the power of appointment by the second section of Article II since it was a "well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment." *Id.*, 272 U. S. at 119. "The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint." *Ibid.*

3. It would be unreasonable "to give to Congress or the Senate, in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Id.*, 272 U. S. at 131.

The holding of the Supreme Court in the *Myers* case, based largely on these reasons, was that the act of removal was an executive act, and therefore was vested by the Constitution in the President. Under this decision it is clear that Congress could not deprive the Executive of discretion with respect to the removal of executive officers.³

³ This case for the reasons discussed under B and C, *infra*, does not involve an office created under that portion of Section 2 of Article II of the Constitution which provides that "Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The constitutional authority for the positions involved here stemmed directly from the President. *Madsen v. Kinsella*, 343 U. S. 341, 358 (1952).

In the *Myers* case the Supreme Court said with respect to offices created under the quoted provision of Section 2 of Article II that: "These words, it has been held by this Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. *United States v. Perkins*, 116 U. S. 483, 485. Here, then, is an express provision, introduced in words of exception, for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase 'But Congress may by law vest' is equivalent to 'excepting that Congress may by law vest.' By the plainest implication it excludes Congressional dealing with appoint-

The *Myers* opinion, however, was not by its terms limited to executive officers, the Court's view being that the President's illimitable power of removal extended to administrative officers performing judicial or legislative as well as executive functions. *Id.*, 272 U. S. at 135. This broad view was modified in the *Humphrey's* case. The statute involved in the *Humphrey's* case provided that members of the Federal Trade Commission could "be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The Supreme Court held that this provision was constitutional, and consequently that a member of the Federal Trade Commission could be removed by the President only for one of the causes stated in the statute. The *Myers* case was distinguished by the Court upon the ground that a postmaster was a "purely executive officer", whereas a Federal Trade Commissioner performs quasi-legislative and quasi-judicial functions. The fundamental doctrine of a division of power between the executive, legislative and judicial branches of the Government was held to be inconsistent with an unrestrictable executive power of removal over officers performing exclusively quasi-legislative and quasi-judicial functions. In concluding its opinion, the Court stated (*Id.*, 295 U. S. at 631-632):

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

"To the extent that between the decision in the *Myers* case, which sustains the unrestrictable power of the

ments or removals of executive officers not falling within the exception and leaves unaffected the executive power of the President to appoint and remove them." *Myers v. United States*, 272 U. S. at 127.

carried with it the power of removal, is enforced by the grant to the President of the power of appointment by the second section of Article II since it was a "well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment." *Id.*, 272 U. S. at 119. "The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint." *Ibid.*

3. It would be unreasonable "to give to Congress or the Senate, in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Id.*, 272 U. S. at 131.

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ments or removals of executive officers not falling within the exception and leaves unaffected the executive power of the President to appoint and remove them." *Myers v. United States*, 272 U. S. at 127.

President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

The *Myers* and *Humphrey's* cases compel the conclusion that the President has discretion under the Constitution to remove purely executive employees. Together they indicate that in general the test of Congress' power to limit or restrict removal will depend upon the character of the office involved, which in turn appears to be determinable by whether the officer is responsible to the Executive, Legislative or Judicial branches of the government.⁴ This "test of responsibility" is supported by other Supreme Court precedents. In *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803), the office involved was that of a justice of the peace of the District of Columbia. The Supreme Court held that the President had no discretion to remove the officer after his appointment had been completed. This decision is clearly reconcilable with the *Myers* case since *Marbury v. Madison* involved an officer performing judicial functions, whereas the *Myers* case involved a postmaster who was purely an executive officer. In *Parsons v. United States*, 167 U. S. 324 (1897), the office involved was that of a United States District Attorney. The Court held that the President could remove Parsons before the expiration of his statutory four year term. This is patently consistent with *Myers*, since in *Parsons* the Court again was dealing with a purely executive officer. *Ex parte Hennen*, 13 Pet. 230 (U. S. 1839), involved the right of the United States District Judge to remove from office a clerk of the District Court. The right was upheld on the ground that such officers were removable at will by the one exercising the power of appointment. This case also is perfectly consistent with the rationale urged here, since the employee involved again was considered removable by the authority to whom he was responsible. Any view completely rejecting the test of responsibility would be intolerable, since it would allow Con-

⁴ See Cross, *The Removal Power of the President and the Test of Responsibility*, 40 Cornell L. Q. 81 (1954).

gress to dictate to the President and to the courts the selection of subordinates, or perhaps allow the courts and the Executive to dictate to the Congress the composition of its legislative committees or the composition of each other's staffs.

Appellant will demonstrate that positions in the Occupation Government of Germany, including those on the Board of Review and the Court of Restitution Appeals, were "purely executive" in character and, accordingly, that under the *Myers* and *Humphrey's* cases, the President acted within his constitutional power in removing appellee from his position as a member of the Board of Review, and in refusing to appoint appellee to a position as Judge of the Court of Restitution Appeals.

B. Appellee's position in the Occupation Government of Germany was of a purely executive character

1. Implementation of the President's power as Commander-In-Chief of the Army and Navy

Participation by the United States in the occupation and government of Germany after its defeat in World War II, was directed by the President as Commander-In-Chief of the Army and Navy.⁵ The creation of Military Government in Germany after its occupation has been graphically described as follows:⁶

"In early May, 1945, after conflict of almost unimaginable proportions, the ground forces of Germany which were still fighting had been pushed back into the boundaries of Germany; the resistance of its army, navy, and air forces was collapsing. The armies of the United States, the United Kingdom, the Union of Soviet Socialist Republics and France were in actual occupation of practically all of Germany. The German government composed of Hitler and his cabinet had come to an end by the death, capture or flight of its members On June 5, 1945 the Commanding Generals of the

⁵ See Mosely, *The Occupation of Germany*, 28 Foreign Affairs 580 (1950).

⁶ The following paragraphs are quoted from Fahy, *Legal Problems of German Occupation*, 47 Mich. L. R. 11-12 (1948). The author was formerly Legal Adviser and Director of the Legal Division, Office of Military Government, Germany.

armies of the United States, the Union of Soviet Socialist Republics, the United Kingdom and of the Provisional Government of the French Republic, issued several documents, including the Berlin Declaration. [Treaties and other International Acts Ser., No. 1520]. This declaration announced the unconditional surrender of all German Armed Forces and declared that Germany had become subject to such requirements as might then or thereafter be imposed.

"A state had been subjugated by force and was without government of its own. The legal vacuum, if it may be so termed, was filled by the formal assumption of authority by the United States, the United Kingdom, the U. S. S. R. and France. The first three named, through the President of the United States, the Prime Minister of the United Kingdom and Marshal Stalin of the U. S. S. R., respectively, met at Potsdam, in the environs of devastated Berlin, in July. They agreed upon the general terms and policies of the occupation, including the means for the government of Germany. The terms of the Potsdam Protocol were made known on August 2, 1945. Whatever ancient or modern theories or precedents may be advanced to describe the situation, the simple fact is that sovereign power in Germany was assumed and exercised by right of conquest accompanied by unconditional surrender of the armed forces and collapse of civil authority. This assumption of supreme authority cannot successfully be challenged under law. It was a development of a war initiated and prosecuted by Germany in violation of international law. The Allies defeated the aggressor and validly imposed terms which placed supreme authority as above noted"

The Potsdam Protocol in 1945 constituted the initial charter for the control of Germany. Actually, however, as noted in the statement of the case, Military Government had been established in Germany prior to the Potsdam Protocol by the field commanders of the allied forces, under the Supreme Commander, General Eisenhower. Upon the conquest of Germany,

General Eisenhower assumed complete legislative, judicial and executive authority as Military Governor of the conquered enemy. All laws and policies were announced by Proclamation of the Military Governor. The American Military Government Courts actually came into operation in September 1944, several months before the Potsdam Protocol.⁷

The authority to institute and exercise military government arises from the right and obligation of a conquering nation, under the laws of war, to protect its own forces and to guarantee order and security for the inhabitants of the conquered territory.⁸ It is "a military duty, to be performed by the President as commander-in-chief, and entrusted as such with the direction of the military force by which the occupation was held." *The Grapeshot*, 9 Wall. 129, 132 (1869). It includes specifically the power to establish a judicial system for the occupied territory, with both criminal and civil jurisdiction. *Mechanics' Bank v. Union Bank*, 22 Wall. 276, 295-297 (1874); *Leitensdorfer v. Webb*, 20 How. 176, 177-178 (1857). Such courts are executive courts, responsible to and subject to the exclusive control of the President. As the Supreme Court said in *Madsen v. Kinsella*, 343 U. S. 341, 357 (1952) with respect to the very Courts involved in this case: "They derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops."

The executive character of these courts makes it evident, under the principles of the *Myers* and *Humphrey's* cases discussed *supra*, that the President had discretion with respect to the appointment or removal of their personnel. The constitutional authority of the judges stemmed directly from the President. *Madsen v. Kinsella*, *supra*, 343 U. S. at 358. Cf. *Toth v. Quarles*, 350 U. S. 11, 24 L. W. 4005, 4007 (1955), in which the Supreme Court noted that those performing judicial functions in military trials "are appointed by military commanders and may be removed at will." Professor Berdahl in his authoritative work, *WAR POWERS OF THE EXECUTIVE OF THE*

⁷ See in general, Nobleman, *American Military Government Courts In Germany*, 40 Amer. Journal of Inter. Law 803 (1946).

⁸ Berdahl, *WAR POWERS OF THE EXECUTIVE OF THE UNITED STATES* 152 (1920).

UNITED STATES, similarly concludes: "Having therefore the power, as Commander-in-Chief, to institute such a temporary government for occupied territory as he may see fit, the President may also perform all the necessary functions of that government, whether executive, legislative, or judicial. He has, in the first place, complete control over the appointment and removal of officers for that government."⁹ And "The officials appointed may be either civilians or military persons, within the discretion of the appointing authority."¹⁰ And "These powers of appointment and removal may be exercised as has been noted, either by the President directly, or through the commanding officer or other subordinate with due authority in the occupied district."¹¹

These conclusions are supported by numerous historical examples,¹² and as just demonstrated, they are clearly right on principle and judicial precedent.

2. *Implementation of the President's powers with respect to the conduct of our foreign relations*

In addition to the President's position as Commander-in-Chief of the Army and Navy, his authority with respect to the administration of occupied Germany also stemmed from his powers with respect to the conduct of foreign relations. As was said by John Marshall when the Chief Justice was a member of the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹³ This conclusion uttered in 1800 was relied upon by the Supreme Court in 1936, when the Court similarly referred to the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."¹⁴ . . .

The history of legislation with respect to the Foreign Service firmly establishes that the President's power over foreign rela-

⁹ Berdahl, *op. cit. supra* at 157.

¹⁰ *Id.* at 158.

¹¹ *Id.* at 159. See also *Mechanics' Bank v. Union Bank*, 22 Wall. 276, 297 (1874).

¹² Berdahl, *op. cit. supra*, Chap. IX.

¹³ *Annals of Congress*, 6 Cong. 613 (Mar. 7, 1800).

¹⁴ *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320 (1936).

tions requires deference to his judgment in the selection of Foreign Service personnel. This history is briefly reviewed in Corwin, *PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 66-70 (1917). During the first sixty-five years of the Republic, Congress passed no act purporting to create any diplomatic rank, the entire matter being left to the President. Thus, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation act even of ministers of a specified rank at this or that place, the provisions with respect to the diplomatic corps specifying only so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents. *Id.* at 67.

The earliest act with respect to the diplomatic and consular corps, which is the present Foreign Service, is the Act of March 1, 1855, entitled "An Act To Remodel the Diplomatic and Consular Systems of the United States." This Act provided in its opening section that "from and after the 30th day of June, next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary, with specified annual compensation for each, "to the following countries," etc. In the body of the Act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or abroad in the employment of the Government at the time of their appointment." *Id.* at 67-68.

The question as to the interpretation of the Act was referred to Attorney General Cushing. The Attorney General in what has become a classic opinion, held that the provisions quoted, and all like provisions in the Act, "Must be deemed directory or recommendatory only, and not mandatory." See 7 Ops.

Atty. Gen. 186, 215-220. For, he continued, with special reference to the provision about the appointment of citizens:

"The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category; but the President may, in my judgment, employ him, if the public interest requires it, whether he be a citizen or not, and whether or not at the time of the appointment he be actually within the United States."

As to the word "shall" in the opening section of the Act,—this, the Attorney General held, must be construed to signify "may":

"For Congress cannot by law constitutionally require the President to make removals or appointments of public ministers on a given day, or to make such appointments at a prescribed rank, or to make or not make them at this or that place And we are not by construction to assume that a legislative act intends any unconstitutional thing when the words can be so construed as to mean a constitutional thing"

The total effect of the Act, the Attorney General concluded was to stipulate the compensation which would be paid to such diplomatic officers as the President, in his judgment, should appoint:

"In regard to all the possible varieties of diplomatic functionaries of the Government the Act leaves them where they stood before, in respect to their relation to the appointing power of the President."

The Foreign Service Act of 1946, consistently with this view, vests broad discretion in the President and the Secretary of State with respect to the selection, retention and removal of Foreign Service personnel, and that Act, therefore, is in general harmony with Attorney General Cushing's opinion. It is clear under the Foreign Service Act, for example, as will be subsequently discussed, that appellee would have no mandatory right to appointment to a Foreign Service position, the entire

matter being under the control of the President, the Secretary of State and other Foreign Service personnel.

Diplomatic negotiations and intercourse are of course regularly conducted through the Department of State, and the acts of the Secretary of State in matters of foreign relations are in legal contemplation the acts of the President.¹⁵ As was recognized recently by this Court, the head of the Department of State is the "political agent" of the President. *Keeffe v. United States*, 94 U. S. App. D. C. 381, 385, 222 F. 2d 390 (1954). That Department in the conduct of foreign relations always has been recognized as being directly subordinate to the control of the President. *Berdahl, op. cit. supra* at 25.¹⁶

The Great Debate of 1789, which was heavily relied upon by the Supreme Court in the *Myers* opinion, actually involved the bill creating the Department of State, or as it was then called, the Department of Foreign Affairs. An important feature of the bill was that it carefully left the head of the new department, so far as he was made an agent in the conduct of foreign relations of the United States, subject to the orders of the President. Thus the head of the new department was to "perform and execute such duties as shall from time to time be enjoined or entrusted to him by the President" and "in such manner as the President of the United States shall from time to time order or instruct." 1 Stat. 28. The act was in marked contrast to the act establishing the Treasury Department, which Congress regarded as primarily an organ for the carrying out of powers entrusted to it and which, therefore, it made subject to its orders. See *Corwin, op. cit. supra* at 39. As was said by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 165-6 (U. S. 1803):

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to this country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conform-

¹⁵ *Jones v. United States*, 137 U. S. 202, 217 (1890); *Berdahl, op. cit. supra* at 25.

¹⁶ See also, Westphal, House Committee On Foreign Affairs 113 ff. (1942).

ity with his orders. In such cases their acts are his acts; and whatever discretion may be used, still there exists, and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and, being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated. The acts of such an officer, can never be examined by the courts."

It is evident that Foreign Service personnel must be and are directly responsible to the President and the Secretary of State. The performance of their duties, particularly with respect to the administration of occupied Germany, obviously involves diplomatic negotiation and intercourse of a very direct and delicate nature. Considered again in the light of the *Myers* and *Humphrey's* decisions, it is clear that the President and his Secretary of State have discretion with respect to the appointment and removal of such officers and employees, and accordingly that the District Court erred in its conclusions.

C. The Veterans' Preference Act, if applicable, could not be construed constitutionally to deprive the President of all discretion with respect to the appointment and removal of appellee

The constitutional problems raised by the District Court's decision are now evident. The position from which appellee was removed and the position to which appellee was refused appointment were created by the President pursuant to his powers as Commander-in-Chief and over our foreign relations. The Board of Review and Court of Restitution Appeals did not owe their existence to any Act of Congress but came into being as a result of an exercise of Executive power under the Constitution. Their incumbents were clearly responsible directly to the President and his military and diplomatic agents; and they performed purely executive duties in administering a foreign occupied territory. In these circumstances, it is clear

that under the Constitution, Congress could not deprive the Executive of discretion in respect to the removal and refusal to appoint appellee.

The District Court's decision that the Veterans' Preference Act did deprive the Executive of all such discretion violates the cardinal principle of statutory construction that statutes be construed to avoid unconstitutionality. "The obligation rests also upon this Court in construing Congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *United States v. C. I. O.*, 335 U. S. 106, 120-121 (1948). See also, *United States v. Harris*, 347 U. S. 612, 618 (1954); *United States v. Rumely*, 345 U. S. 41 (1953). The District Court's construction of the Act in this case unnecessarily raises Constitutional questions which a reasonable construction would avoid entirely. The reasonable construction readily available to the District Court was one recognizing the pertinent provisions of the Act as recommendatory or directory rather than mandatory. This was the view taken by Attorney General Cushing in his opinion referred to above, and it is the view supported by historic practice. See *Corwin, Op. cit. supra* at 703. In *United States v. Eaton*, 169 U. S. 331, 346 (1898), it was contended that as a vice consul was required by law (Rev. Stat. § 1698) to give bond before he enters on the execution of his trust, it was error to allow compensation for a period prior to approval of bond. The Court, rejecting this contention, said: "The finding by the Court below that Eaton entered on the discharge of his duties when designated, at once communicated with the Department of State, and was recognized as consul-general and allowed to perform all the duties of that office, answers this contention. It is settled that statutory provisions of the character of those referred to are directory and not mandatory." The *Eaton* case shows that use of the words "shall" or "may" is not decisive. Cf. also, *Escoe v. Zebst*, 295 U. S. 490, 493 (1935); *West Wisconsin Railway Co. v. Foley*, 94 U. S. 100, 103 (1876); *Doehla Greeting Cards, Inc. v. Summerfield*, — U. S. App. D. C., — F. 2d —, No. 12,484, Slip. Op. 4 (Nov. 3, 1955). As this Court recognized in *Fields v. United States*, 27 App. D. C. 433, 440 (1906); "Words like may, must, shall, and so forth, are

constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed."

Congress and the Civil Service Commission have shown considerable awareness of the Constitutional problem involved in this very statute. The problem was discussed, for example, in the 78th Congress during the Hearings before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, the bills out of which the Veterans' Preference Act evolved. In discussing Section 8 of the bills (also Section 8 of the Act as originally enacted, 5 U. S. C. § 857 (1952)), Mr. Arthur S. Flemming, then a Civil Service Commissioner, pointed out that an appointing officer would not have to follow the decision of the Civil Service Commission with respect to the sufficiency of his reasons for passing over a veteran in selecting among those eligible for appointment from an appropriate register. He stated by way of explanation the following: "Of course, it is clear that under the Constitution a requirement that he [the appointing officer] would be compelled to follow our decision would probably be regarded as unconstitutional because the appointing authority rests with the heads of the departments and agencies, and you cannot, therefore, completely eliminate their discretion." Hearings, *supra* at 23. Mr. Flemming reasserted this point under questioning by Senator Langer, stating later in the hearings as follows: "I know that those who worked on the forming of this bill went into that problem very carefully and they are all convinced that you cannot go any further than that. If you go any further than that, you are then telling the appointing officer that he must pick John Jones, and thereby take away all of his discretion. Under the Constitution, the appointing authority in the Federal Government rests with the head of the department or agency." Hearings, *supra* at 25. Still later, on the same subject, Mr. Flemming reiterated: "As I understand it, it is the judgment of a good many constitutional lawyers that beyond that the Congress cannot go because of the fact that you would take away completely the appointing officer's discretion." *Ibid.* Finally, Mr. Panion, from the Senate Office

of Legislative Counsel, who was in attendance at the Hearings, was asked for his opinion on the matter. His reply, in part, was "I think the precedents are as Mr. Flemming points out . . ." (Hearings, *supra* at 28), thus substantiating Mr. Flemming's position.

A careful examination of the Veterans' Preference Act as it was enacted in 1944, will show that it did not contain any provisions making the determinations of the Civil Service Commission mandatory. Section 8 of the Act, for example, to which reference was made in Mr. Flemming's testimony, provided only that the Commission's findings were to be "considered" by the appointing officer (*infra* at 61-62). Section 19, which authorized the Commission to promulgate appropriate rules and regulations for the administration of the Act, did not say that those rules would be obligatory on any other agency (*infra* at 65). Section 12 with respect to reductions in force and agency transfers, likewise contained no mandatory provisions (*infra* at 63). And, finally, even Section 14, with respect to appeals in discharge cases, provided only that the Commission could submit its "recommendations" to the proper administrative officer (*infra* at 63-64).

These limitations on the Commission's authority, as indicated by the testimony of Commissioner Flemming, undoubtedly were imposed in deference to the Constitutional objections involved. In later Congresses, when it was proposed to amend provisions of the Act so as to make the decisions of the Civil Service Commission mandatory, the Commission reiterated the Constitutional objections to the changes proposed. See H. Rep't. No. 315, 80th Cong. 1st Sess. 2-4 (1947); H. Rep't. 1817, 80th Cong., 2d Sess. 2 (1948). These amendments were adopted by the Congress with the obvious intention that they be applied Constitutionally.

There is considerable doubt whether the mandatory jurisdiction of the Civil Service Commission ever even purported to attach to the provisions of Section 12 of the Veterans' Preference Act, which are relied upon here. In this connection, it is important to note that, contrary to the position of the District Court, there is nothing automatic or mechanical about the operations of Section 12. Before it comes into play, three conditions must be satisfied: (1) there must be a "transfer

of functions" between the agencies involved; (2) the employees affected must be "qualified" for positions in the replacing agency, and (3) the employees affected need be appointed only before the successor agency appoints "additional employees from any other source for such positions." Obviously, under these provisions judgment must be exercised in determining whether there has been a transfer of functions, whether the employees are qualified for positions in the transferred function, and whether any additional employees have been appointed for such positions. Argument III will show that relief must be denied appellee in this case because there was no transfer of functions, no showing that appellee was qualified for this position he sought, and no showing that additional employees were appointed to such positions. Under the present Argument, the point emphasized is that there is nothing in Section 12 or in any other provision of the original Veterans' Preference Act which could possibly be construed to make mandatory upon the particular agencies affected, the determinations of the Civil Service Commission on the issues involved in applying Section 12. It is noteworthy, furthermore that although later, specific amendments were made to numerous sections of the Act purporting to make the Civil Service Commission's decisions mandatory with respect to the matters involved in these other sections, no such specific amendment ever was adopted with respect to the pertinent provisions of Section 12 of the Act. Finally, it is highly significant that all of the amendments to the Act were adopted only after the Foreign Service Act of 1946 had been passed. As will become more evident after consideration of Argument II, *infra*, this indicates that before the "mandatory" amendments were adopted, all Foreign Service personnel had already been statutorily recognized as being under the exclusive jurisdiction of the President and the Secretary of State. There is no indication that these amendments ever were intended to alter this recognition of the separate status of Foreign Service officers and employees.

The District Court's construction of the Veterans' Preference Act obviously was based on a failure to recognize the

Constitutional problems suggested by any statutory provision which purported to deprive the Executive of all discretion with respect to the removal of purely executive employees. It is not intended to suggest that the Veterans' Preference Act is in any respect unconstitutional; appellant makes no such claim. Appellant's position is only that the provisions of the Act relied upon here, if applicable at all, were intended to be directory or recommendatory only. It will be shown under Argument II that it is even more likely that these provisions were not intended to be applicable at all to Foreign Service positions in the Occupation Government. On either interpretation, the decision of the District Court was erroneous.

II

The Veterans' Preference Act was not applicable to Foreign Service positions in the Occupation Government of Germany

Argument I established that as a minimum requirement under the Constitution, the Veterans' Preference Act, if applicable to the positions involved in this case, would have to be construed as recommendatory or directory rather than mandatory. The present Argument will show that the Act can also be reasonably construed and should be construed as being entirely inapplicable to these positions.

As was pointed out in the statement of the case, *supra*, all positions under HICOG, including specifically the positions of Judges of the Court of Restitution Appeals, were under the Foreign Service and were staffed by Foreign Service personnel. It is appellant's contention that the Foreign Service Act of 1946 was intended to be the exclusive statutory authority for the appointment and removal of employees to such positions, and accordingly that the Veterans' Preference Act was entirely inapplicable. It will now be shown that this construction of the Foreign Service Act, which avoids any constitutional issue, is reasonable, and therefore is to be preferred over the District Court's contrary construction which raises serious constitutional questions.

A. The Foreign Service Act of 1946 vested exclusive control over Foreign Service appointments and removals in the Secretary of State, not the Civil Service Commission

The Foreign Service Act of 1946 provided the statutory authority for a complete reorganization and overhaul of the Foreign Service. In the words of Congressman Vorys, a member of the House Committee on Foreign Affairs which considered the bill, spoke in floor debate: "The bill is a reorganization of the Foreign Service, which is practically a separate branch of the Government. . . . It makes the Foreign Service hard to get in, and hard to stay in." 92 Cong. Rec. 9589.

The purpose of the Act was to develop and strengthen the Foreign Service so as among other things: (1) "to enable the Foreign Service effectively to serve abroad the interests of the United States"; (2) "to enable the Foreign Service adequately to fulfill the functions devolving on it by reason of the transfer to the Department of State of functions heretofore performed by other Government agencies"; (3) "to provide improvements in the recruitment and training of the personnel of the Foreign Service"; (4) "to provide a flexible and comprehensive framework for the direction of the Foreign Service in accordance with modern practices in public administration"; and (5) "to codify into one chapter all provisions of law relating to the administration of the Foreign Service." 22 U. S. C. § 801. The Act provided that all officers and employees of the Foreign Service "shall, under the direction of the Secretary, represent abroad the interests of the United States . . ." 22 U. S. C. § 841.

The Act gives the Secretary of State complete authority, except where authority is specifically vested in the President, "to prescribe regulations not inconsistent with the Constitution and the laws of the United States in relation to the duties, functions, and obligations of officers and employees of the Service and the administration of the Service," 22 U. S. C. § 842. See also 22 U. S. C. §§ 811a and 821. And even in cases where authority to prescribe regulations relating to the Foreign Service or the duties and obligations of officers and employees of the Service is specifically vested in the President by the terms of the Act, or any other Act, the President may

nevertheless "authorize the Secretary to prescribe such regulations." 22 U. S. C. § 843. A Board of Foreign Service is created to make recommendations to the Secretary "concerning the functions of the Service; the policies and procedures to govern the selection, assignment, rating and promotion of Foreign Service officers; and the policies and procedures to govern the administration and personnel management of the Service" 22 U. S. C. § 826 (b). A Board of Examiners is created under the Board of the Foreign Service with the responsibility for supervising the conduct of examinations to candidates for appointment as Foreign Service officers. 22 U. S. C. § 827.

Specific personnel categories are established by the Act including Chief of Missions, Foreign Service officers, Foreign Service Reserve officers, and Foreign Service staff officers, and employees and consular agents. 22 U. S. C. § 861. Detailed procedures and requirements with respect to the appointment of employees in each of these categories are provided. See 22 U. S. C. §§ 901, 906, 922, 936 and 951. These provisions obviously vest broad discretion in the Secretary. Section 936, for example, which relates to the appointment of staff officers, merely provides that: "The Secretary shall appoint staff officers and employees under such regulations as he may prescribe and, as soon as practicable, in accordance with the provisions of Sections 886-888 of this title."¹⁷ Section 1021 provides that "The Secretary may, under such regulations as he may prescribe, separate from the Service any staff officer or employee on account of the unsatisfactory performance of his duties" following a hearing by the Board of Foreign Service. Also provided are specific provisions with respect to salary scales, time for receiving salary, classification of positions, personnel administration, promotions and separations from the Service. See 22 U. S. C. §§ 866-873, 881-882, 886-890 and 981-

¹⁷ Section 886 provides for the classification of positions by the Secretary under such regulations as he may prescribe. . . ." Section 887 authorizes the Secretary to establish new groups of positions for officers and employees "whenever he deems such action to be in the interests of good administration. . . ." Section 888 authorizes the establishment of salary differentials by the President under some circumstances when he finds and declares that the rates of salary provided are inadequate.

1036. The Secretary is authorized to establish a Foreign Service Institute for the training and instruction of officers and employees of the Service. 22 U. S. C. §§ 1041-1047. A special retirement and disability system is established. 22 U. S. C. §§ 1061-1116. Allowances and special allotments are authorized. 22 U. S. C. §§ 1131-1133, and provisions are made for travel and related expenses. 22 U. S. C. §§ 1136-1139. A commissary service is established. 22 U. S. C. § 1139, and there are special provisions for medical service. 22 U. S. C. §§ 1156-1158. Section 1131 of the Act, 60 Stat. 1035, contains 67 specific repealer clauses. Section 1132, 60 Stat. 1040, provides in addition that "any statute that is not repealed by Section 1131 but which is inconsistent with any of the provisions of this Act, shall be considered as having been amended or superseded by such provisions." Section 1061 provides: "The provisions of this Act should be construed liberally to effectuate its purposes."

It seems clear from the foregoing summary that the Foreign Service Act vests complete authority with respect to the administration and direction of the Foreign Service in the Secretary of State. The whole tenor of the Act shows that it was carefully drawn to give the Secretary of State and the special boards set up in the Foreign Service exclusive control over such matters as the selection and retention of personnel, their promotion and retirement, and every other phase of their employment activity. The sum of the Act is to create a unique special corps of employees to serve abroad the interests of the United States under a complete and integrated personnel program designed to develop the best possible overseas representation of American interests. Appellee's claims that the Secretary of State *must* appoint him to the position of Judge on the Court of Restitution Appeals obviously finds no support in any provision of the Foreign Service Act.

B. The Foreign Service Act of 1946 superseded the Veterans' Preference Act with respect to positions in the Foreign Service

It is a familiar rule of statutory construction that where two laws dealing with the same subject matter are incompatible, and can not stand side by side, one must yield to the other, and the later in date will prevail. Appellant will show below

that the Veterans' Preference Act of 1944 is incompatible with the provisions of the Foreign Service Act of 1946 and accordingly, that if the Veterans' Preference Act ever was applicable to the Foreign Service, it must be considered as having been superseded by the later Foreign Service Act. It also will be shown that the Foreign Service Act constitutes, in the present context, "special legislation" while the Veterans' Preference Act is "general legislation" and accordingly, that the Foreign Service Act for that reason must be construed to overrule the inconsistent provisions of general law which might otherwise be applicable.

Section 1 of the Veterans' Preference Act, 5 U. S. C. § 851, provides in pertinent part that preference shall be given to ex-servicemen and women in certification for appointment to any civilian position in the Government. Section 2, 5 U. S. C. § 852, requires that in all examinations to determine the qualifications of applicants for entrance into the Government service, all veterans shall have either ten points or five points added to their earned ratings. Section 3, 5 U. S. C. § 853, provides that in examinations where experience is an element of qualification, time spent by a veteran in the military service shall be credited. Section 4, 5 U. S. C. § 854, provides for waiving requirements as to age, height and weight for veterans under certain circumstances. Section 7, 5 U. S. C. § 856, provides that the names of veterans who have received a passing grade shall be entered on appropriate registers in accordance with their "augmented" ratings and ahead of all non-veterans having the same rating. Section 8, 5 U. S. C. § 857, provides that where an appointing officer passes over a veteran in making a selection for appointment from an appropriate Civil Service register, he must file reasons in writing for so doing with the Civil Service Commission, which then has authority to pass upon the sufficiency of the reasons given. Section 14, 5 U. S. C. § 863, provides that no veteran who has completed a probationary or trial period¹⁸ shall be discharged except for such

¹⁸ The two-year probationary period for Foreign Service staff personnel prescribed by Foreign Service regulations is inconsistent with the one-year trial period prescribed by regulations issued by the Commission pursuant to the Veterans' Preference Act. If the Veterans' Preference Act applied to the Foreign Service, then a veteran who had served only one year could not

cause as will promote the efficiency of the service and for reasons given in writing. The veteran must be given thirty days advance written notice, stating any and all reasons, specifically and in detail, for any such proposed action. He must be allowed a reasonable time for answering the same personally and in writing, and the right to appeal to the Civil Service Commission from an adverse agency decision. He must also be allowed to make a personal appearance before the Civil Service Commission, and the final decision of the Civil Service Commission must be accepted by the agency concerned. The first part of Section 12 of the Veterans' Preference Act, 5 U. S. C. § 861, provides that in any reduction in personnel competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings. The first part of this Section also provides that the length of time spent in active service in the armed forces shall be credited in computing length of total service. It further requires that veterans with efficiency ratings of good or better must be retained in preference to all other competing employees. The second part of Section 12 of the Veterans' Preference Act, 5 U. S. C. § 861, which is the portion of the Act appellee claims applicable here, provides "That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

These various sections, which are the substance of the Veterans' Preference Act, are plainly in conflict with the comparable provisions of the Foreign Service Act. The procedures with respect to qualifications for appointment, for discharge or

be separated during the second year of probationary service except after compliance with the provisions of Section 14. This certainly would be contrary to the Foreign Service Act in which Congress clearly intended that all persons selected for permanent appointment into the Service should have fully demonstrated their suitability to the Secretary of State.

suspension, for appointments from the Civil Service Register, ten and five point examination credits, experience credits for military service, waiver of physical requirements, and the like, cannot stand side by side with the completely different appointment and retention processes prescribed by the Foreign Service Act. More important than differences in details, of which there obviously are many, the entire purpose of the Veterans' Preference Act to "augment" qualifications of veterans and give them priority in appointment and retention in employment simply is incompatible with the heavy emphasis in the Foreign Service Act on the development of a career service based completely on merit and actual qualifications. However salutary are the motives and objectives of a veteran preference system of employment, it is uncontested that such a system is not designed for the purpose of choosing among applicants for appointment those best qualified. The Veterans' Preference Act is based on a justifiable premise that the Nation owes a great debt to ex-servicemen which can be partially repayed by giving them an edge in competing for jobs against non-veterans; it is not based on any premise that merit alone shall be considered. If the above-described sections of the Veterans' Preference Act are applicable to the Foreign Service, then whole portions of the Foreign Service Act, and regulations issued pursuant thereto, are rendered nugatory. In practical effect, the Civil Service Commission in some cases could exercise a veto power over selections by the Secretary of State of persons to represent the United States abroad.

Considered in all their parts, it is clear that the conflict between the provisions of the Veterans' Preference Act of 1944 and the Foreign Service Act of 1946 cannot be resolved. Their fundamental difference perhaps can be best summarized by recalling the words of Congressman Vorys quoted above in which he said that the Foreign Service Act of 1946 "makes the Foreign Service hard to get in, and hard to stay in." This certainly is irreconcilable with the obvious policy of the Veterans' Preference Act to make it easier for veterans to get into Government service and easier for them to stay in.

We are relying now directly on the principle of statutory construction that the later of two laws dealing with the same

subject matter will prevail over the inconsistent provisions of the earlier law. This Court recently applied this rule of construction in *Myers v. Hollister*, — U. S. App. D. C., —, 226, F. 2d 346, No. 12420 (September 1, 1955) a case presenting a problem very similar to that involved here. The *Myers* case involved the construction of the so-called MSA proviso contained in Section 7 (f) of the Mutual Security Act of 1952, 22 U. S. C. § 1655 (d). That proviso was to the effect that ninety days after the enactment of the Mutual Security Act of 1952 the personnel administering the Act shall be in the aggregate at least five per cent less than the number on June 1, 1952: "Provided further, that after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned". The Court held that this proviso superseded the first part of Section 12 of the Veterans' Preference Act, and that the Director of the Mutual Security Agency therefore was not bound to observe the requirements imposed by the Veterans' Preference Act in carrying out the agency's reduction in force program.

The appellant's position in the present case is *a fortiori* under this Court's holding in *Myers v. Hollister*. In *Myers* the Court concluded that one sentence: "The determination as to which individual employees shall be retained shall be made by the head of the agency concerned," was a sufficient expression of Congressional intention that the Veterans' Preference Act be inapplicable. Here we have an entire statute covering some 106 pages in its slip form version containing numerous special provisions with respect to personnel appointments, status and retention. These special provisions in a multitude of ways, as we have shown above, are inconsistent with comparable provisions and the whole policy of the Veterans' Preference Act and the rules promulgated under it. If the brief Mutual Security Act proviso just quoted did not present "a doubtful case" with respect to implied repeal of the inconsistent provisions of the Veterans' Preference Act, and this Court so held, then certainly there can be no question at all about the effect of the Foreign Service Act of 1946 on the even more strikingly incon-

sistent provisions of the same Veterans' Preference Act. As the majority opinion pointed out in *Myers v. Hollister*, while two allegedly conflicting statutes should be construed to give effect to the language and intent of both so far as may be possible" . . . this process can not be carried to such length as to deprive one or the other of the statutes of its essential meaning."

Myers v. Hollister also recognizes and applies another general principle of statutory construction of direct application to the present case. Under this principle, a general law with respect to a particular subject matter is construed as amended by a special law of limited applicability pertaining to the same subject matter. Insofar as reduction-in-force in Federal agencies is concerned, this Court declared in the *Meyers* case that the "Veterans' Preference Act occupies the position of a general law . . ." The Foreign Service Act provisions, on the other hand, in this context are clearly intended to be of special application to the Foreign Service, and like the MSA proviso, they do not impair or affect in any way application of the general law to all other Federal agencies. As such, the special provisions of the Foreign Service Act again must prevail over the inconsistent general provisions of the Veterans' Preference Act.

The majority opinion in the *Myers* case noted that "The regulations of the Civil Service Commission on the subject of reduction in force are extremely complex, and are evidently designed to repose a minimum of power and discretion in agency heads in the administration of reduction-in-force programs. Most emphatically, those regulations do not provide that 'the determination as to which individual employees shall be retained shall be made by the head of the agency concerned.' It is fair to say that they provide, in substance, exactly the contrary." *Id.*, Slip Op. 3. Could Congress possibly have intended to subject the actions of the Secretary of State in respect to developing and maintaining a Foreign Service to represent the interests of the United States abroad to any such extremely complex regulations imposing a "minimum of power and discretion in agency heads." The broad discretionary

powers and the detailed personnel policies set forth in the Foreign Service Act and the unique function and history of the Foreign Service belie any such contention. It must be concluded, therefore, that the Foreign Service Act of 1946 superseded the Veterans' Preference Act insofar as the latter Act ever was applicable to the Foreign Service corps.

C. The Veterans' Preference Act was never intended to be applicable to positions in the Foreign Service

It was noted in *Brannan v. Elder*, 341 U. S. 277, 284 (1951), that the Veterans' Preference Act was for the most part a codification of existing laws and regulations: "In general, the Act was designed to give legislative sanction, to existing veterans' preference and to 'give some additional strength' to that preference. Additional rights granted were specifically brought to the Congress' attention." *Id.*, 341 U. S. 277 at 284. The Foreign Service is never once referred to in the Legislative history of the Veterans' Preference Act, hence Congress must not have contemplated that the act would make significant change in the administration of the Foreign Service. It has always been recognized that legislation generally applicable to employees of the civil service was not applicable to employees of the Foreign Service except as Congress might specifically indicate. Veterans' Preference regulations in existence before adoption of the Veterans' Preference Act did not cover the Foreign Service. Executive Order No. 7915, 5 C. F. R. 12,301 (Supp. 1943). If the Veterans' Preference Act is a mere codification of existing laws and regulations, with legislative sanction for certain rights previously contained only in executive orders and regulations, there certainly is grave doubt whether the Veterans' Preference Act was intended to apply to the Foreign Service when enacted in 1944. Had the Congress intended that the 1944 Act would confer on the Civil Service Commission a new and sweeping grant of authority to prescribe rules and regulations applicable to the Foreign Service, and that the Act would limit and prescribe the Secretary's authority to administer the Service, it is to be presumed that the Congress would have expressed its intent in clear and unambiguous language. Certainly it is reasonable to conclude

that the Veterans' Preference Act is entirely inapplicable to the Foreign Service.

III

The Veterans' Preference Act, if applicable, was not violated in removing appellee from his position with OMGUS and refusing to appoint him to a position in HICOG

If the Court agrees with appellant's position that the Veterans' Preference Act is entirely inapplicable to this case, or if applicable, that it is recommendatory rather than mandatory, then it will be unnecessary for the Court to consider whether the provisions of the Veterans' Preference Act were violated here. Appellant respectfully submits that the Court will conclude that appellant's basic positions under Arguments I and II are correct and therefore that the specific questions with respect to application of the Veterans' Preference Act will not be pertinent to the Court's decision. However, since the trial court erroneously concluded that the Veterans' Preference Act had been violated, this issue will now be discussed.

A. The District Court failed to make essential findings under the Act

As was pointed out under Argument I, C, *supra*, there is nothing automatic or mechanical about the application of Section 12 of the Veterans' Preference Act. Before it comes into play, three conditions must be satisfied: (1) There must be a "transfer of functions" between the agencies involved; (2) The employees affected must be "qualified" for positions in the replacing agency, and (3) The employees affected are required to be appointed only before the successor agency appoints "additional employees from any other source for such positions. Neither the District Court nor the Civil Service Commission have made the requisite findings under this section with respect to the "qualifications" of the employee or the hiring of "additional employees" for such positions. There is no reason for concluding that the transfer of function requirement is any more important than the other requirements. In fact, the legislative history of the Act makes it evident that all three conditions were considered important. During the

hearings on the bill which became the Veterans' Preference Act, Senator Byrd raised a question as to whether Section 12 was intended to "guarantee" that a veteran employed by a transferred agency would have a job. Hearings before the Senate Committee on Civil Service, 78th Cong., 2d Sess. 10 (1944). Mr. Flemming's reply was that: "It does not guarantee a job. It simply provides, if there is a transfer of that kind, that the agency to which the functions have been transferred cannot go into the open labor market to recruit people until they have placed all preference eligibles who are qualified for positions in that agency." *Ibid.* Returning to the subject later in the hearings, Mr. Flemming addressing himself again to Senator Byrd's question, made this additional comment: "I think, Senator, I can explain that best by using an illustration. Let us assume that the Bureau of Public Roads were transferred from the Federal Works Agency back to the Department of Agriculture at some time in the future. Under this provision, the Department of Agriculture would have to place all preference eligibles in positions for which they are qualified before it could go out into the open labor market and begin to recruit new employees for the Department of Agriculture." *Id.* at 29. When Senator Byrd then asked: "If there was no position available for them, they would not be forced to give them employment?", Mr. Flemming replied: "That is right." *Ibid.*

There is on the present record no showing at all that appellee was qualified for appointment as a Judge to the Court of Restitution Appeals or that any employees were hired from the "open labor market" for such positions. On the contrary, the record does show that appellee was not qualified for the appointment since he never was in the Foreign Service; and all appointments to the Court of Restitution Appeals were made from the Foreign Service, not from the "open labor market". The complaint in the District Court, in fact, does not even allege that these conditions under Section 12 were satisfied. It is submitted that under these circumstances the complaint was fatally defective, and for this reason alone the District Court erred in granting appellee's motion for summary judgment. The Commission likewise erred in rendering its decision with-

out considering these additional prerequisites.

The District Court and the Civil Service Commission did determine that there had been the requisite transfer of functions. Appellant will now show that on this equally important issue both the District Court and the Civil Service Commission erred.

B. The District Court erred in finding that the functions of the OMGUS Board of Review were transferred to the HICOG Court of Restitution Appeals

The trial judge's conclusion that there had been a transfer of functions from the Board of Review under OMGUS to the Court of Restitution Appeals under HICOG is based on a gross oversimplification of the significance of the conversion from a military to a civilian occupation of Germany. It is true that both the Board of Review and the Court of Restitution Appeals were concerned with cases involving the restitution of property to victims of Nazi oppression and that both were part of an occupation government. From this it might perhaps be concluded that both agencies exercised the same "powers" with respect to restitution cases, just as it might be said in general that OMGUS and HICOG exercised the same "powers" with respect to the occupation of Germany. Cf. *Madsen v. Kinsella*, 343 U. S. 341 (1952). It hardly follows from this, however, that the Board of Review and the Court of Restitution Appeals exercised the same "functions."

An analogy which may clarify the distinction which existed is suggested by the proposal made by the American Bar Association to transfer unfair labor practice cases under the Labor Management Relations Act of 1947 from the National Labor Relations Board to the District Courts. If such a transfer were made, it would be true thereafter that the courts were exercising jurisdiction with respect to the same subject matter as had the Board. Would it, however, be seriously contended that therefore Board Members who were veterans preference eligibles would have to be appointed to the judiciary. Obviously not, because as in this case, while there might be a transfer of powers with respect to unfair labor practice cases, there would be no transfer of functions. To conclude other-

wise would defeat the whole purpose of effecting such a transfer, namely, to accord to participants in unfair labor practice proceedings the full benefit of a judicial rather than an administrative proceeding, with decisions by judges of our courts of law and not by members of an administrative board. In a real sense such a transfer would tend to formalize the rights of participants based upon a greater recognition of the judicial rather than the administrative nature of their claims. It would be premised on the theory that the rights of the participants in such cases had developed to a stage where they deserved judicial as distinguished from administrative protection. In short, the whole character of the unfair labor practice proceedings would be fundamentally altered by such a transfer of jurisdiction from the National Labor Relations Board to the courts, although in the end each tribunal would be exercising powers with respect to the same subject matter.

Much the same situation actually existed in this case after the conversion of the military to a civilian occupation in Germany and the transfer of powers from the OMGUS Board of Review to the HICOG Court of Restitution Appeals.

Prior to September 21, 1949, when the Department of State became the responsible department for administration of affairs in Germany (other than the command to troops), the military government had been established by the military authorities in accordance with international law and practice. We have already discussed in detail the development of this phase of the Occupation Government. At this stage any rights accorded to the German people were minimal and clearly a matter of privilege such as is granted by any conqueror to a defeated nation.

The promulgation of the Occupation Statute on April 8, 1949, by the Military Governors of the United States, France and the United Kingdom presaged a wholly new relationship between the three occupying powers and the new German Government. Agreements entered into by the Foreign Ministers that Spring provided that military government in Germany would disappear; that the functions of the Allies would be mainly supervisory; that aside from security matters, the exercise of direct powers would be regarded as temporary and

self-liquidating; and that, with the establishment of the German Federal Republic and the termination of military government, military responsibilities would be exercised by the respective commander-in chief, and all other duties by civilian high commissioners, the three high commissioners together constituting the Allied High Commission. In an agreement as to tripartite controls it was provided that the nature and extent of controls exercised by the Allied High Commission would be in harmony with the Occupation Statute and would be designed to permit the German Federal Republic to exercise increased responsibilities over domestic affairs. To reduce the burden of occupation costs, staff personnel was kept to a minimum. (J. A. 51-55).

In accord with these agreements, the President of the United States on June 6, 1949, issued Executive Order No. 10062, which established the position of United States High Commissioner for Germany, and provided that such position should be Chief of Mission, Class 1, in accordance with the provisions of the Foreign Service Act of 1946. Under the immediate supervision of the Secretary of State (subject to consultation with and ultimate direction by the President), the High Commissioner was authorized to exercise all of the governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of the Chief of Mission within the meaning of the Foreign Service Act of 1946. Obviously, the entry into force of the Occupation Statute on September 21, 1949, marking the termination of Army government, inaugurated a new relationship between the three Allied powers and Germany.

The major difference between the Court of Restitution Appeals established by the High Commissioner and the Board of Review which had been established by the Military Governor was the judicial character of the former and administrative character of the latter. In a sense, this reflects the overall difference between civilian and Army control. The Court of Restitution Appeals unlike the Board of Review was an integral part of the United States Courts of the Allied High

Commission exercising full judicial powers. Whereas the Board of Review had consisted of four members serving on full time duty, the Court of Restitution Appeals was a standing panel of not less than three justices or judges assigned from the judiciary of the United States Court of the Allied High Commission for Germany. The judges of the Court of Restitution Appeals were Foreign Service officers or employees, while the Members of the Board of Review under OMGUS were employees of the Department of the Army. The powers and jurisdiction of the Court of Restitution Appeals were greatly increased. The Justices and Judges of the Court, unlike the Members of the Board, were given power to punish for contempt. The rules of practice before the Court of Restitution Appeals were the same as those for all other courts, whereas the Board of Review had promulgated its own rules.

It is submitted that a correct appreciation of the transfer of occupation powers from Military Command to the Foreign Service must lead to the conclusion that there was no mere transfer of functions between the two occupying authorities. The changeover was of profound significance in respect to our relations to a new German Republic and the German people. It was dictated by those in charge of formulating and carrying out our foreign policy, and it permeated each and every organ operating under the respective authorities. Restitution cases, of course, were only a minor part of this whole program, but the differences in their handling perhaps typifies the fundamental differences between two periods of control. Their transfer from an essentially administrative board, exercising only administrative review or at most quasi-judicial functions, to the newly established courts of the United States Court of the Allied High Commission, exercising full judicial powers, signified a momentous change in the nature of the proceedings, the decisional process and the character of the rights involved in restitution cases. The change was no less drastic than that suggested in the analogy involving a transfer of jurisdiction with respect to unfair labor practice cases from the National Labor Relations Board to the courts. In both cases the change described could not reasonably be considered to involve a mere

transfer of functions within the meaning of Section 12 of the Veterans' Preference Act.

IV

The Court is without jurisdiction to award declaratory judgment and mandatory relief since the Board of Review and the Court of Restitution Appeals are no longer in existence

The recent decision of this Court in *Burrell v. Martin*, — U. S. App. D. C. —, — F. 2d — (No. 12376, Nov. 10, 1955) considered the problem of mootness on appeal in a suit such as this involving a complaint for declaratory judgment and reinstatement. Under the facts in that case, the Court rejected the claim of mootness on two grounds: First, because an adjudication of the invalidity of the discharge "may have a material bearing on the controversy over reinstatement which is still extant", and secondly, because such an adjudication may also have "a practical effect on appellant's right to collect back pay for the period of her illegal discharge." With respect to this second consideration the Court explained:

"Under the Tucker Act (62 Stat. 933 (1948)), as amended 28 U. S. C. § 1346 (d) (1952), of course, only the Court of Claims has jurisdiction to determine the merits of appellant's monetary claim. But we recognized in *Almour v. Pace* (90 U. S. App. D. C. 63, 66, 193 F. 2d 699, 701 (1951)) that 'the District Court can properly declare individual rights, even though the plaintiff also possesses and is seeking to advance a monetary claim,' where, as here, the plaintiff has 'requested an order which would affect his status or establish his rights as to the future vis-a-vis some governmental agency.'"

In this case there is no extant controversy over reinstatement, and a decision by this Court could not establish appellee's rights "as to the future vis-a-vis some governmental agency." The reason is that the two tribunals involved, the Board of Review and the Court of Restitution Appeals are no longer in existence having been abolished with the termination of the Occupation Government in Germany, the restoration of full sovereign rights to the Federal Republic of Germany, and the reestablishment of normal diplomatic relations with Ger-

many. It is clear under these circumstances that the only possible claim appellee may advance is monetary. As this Court unmistakably recognized in the *Burrell* case, such claims are exclusively within the jurisdiction of the Court of Claims where, as in this case, no question as to the future status of the claimant vis-a-vis some governmental agency is involved. Accordingly, it is clear that this litigation must be dismissed as moot. See in addition to the *Burrell* case, *Kletzing v. Young*, 93 U. S. App. D. C. 374, 210 F. 2d 729 (1954).

Actually the District Court was without jurisdiction at any time to declare appellee's rights with respect to the Board of Review, since that Board went out of existence long before this suit was commenced. The judgment of the District Court that appellee be retroactively reinstated to duty on the Board of Review, despite its nonexistence, could be complied with only by paying back pay to appellee for the period in question. The District Court's order on this point, therefore, was in direct violation of the prohibition in the Tucker Act against such claims being brought in the district courts. As this Court recognized in the *Burrell* case, such declarations where no questions as to the complainants *future* relations with the agency is involved, are a clear infringement on the jurisdiction of the Court of Claims.

The only remotely comparable tribunal now in existence in Germany is the Supreme Restitution Court. As noted in the statement of the case, this Court came into existence in August 1955, three months after the so-called Bonn Agreements of 1952, as amended by the Paris Protocol of 1954, entered into effect. See Senate Document No. 11, 84th Congress, First Session, 1955. One of the Agreements, the Convention on the Settlement of Matters Arising Out of the War and the Occupation (Senate Document 11, page 77) dealt with the subject of internal restitution in Chapter Three (Senate Document 11, page 86). It was therein provided, in Article 6, that a Supreme Restitution Court was established to succeed to the highest restitution courts of the United States, British and French Zones, including the United States Court of Restitution Appeals of the Allied High Commission for Germany. It was further provided that "Each Tribunal to which the Supreme Res-

stitution Court succeeds shall within three months decide those cases in process of final disposition on the entry into force of the present Convention and shall refer to the Supreme Restitution Court all cases not decided at the end of that period." Pursuant thereto, on August 5, 1955, the United States Court of Restitution Appeals of the Allied High Commission in Germany transferred all cases in process of final disposition and not decided to the Supreme Restitution Court established under the Convention.

The Charter of the Supreme Restitution Court appears as an annex to Chapter Three of the said Convention (Senate Document 11, page 90). It is therein provided, in Article 1, paragraph 2, that a Division of the Court should have at least five justices, and in Article 2, paragraph 1, it is provided that the Third Division (with its seat at Nuremberg (Article 1, paragraph 5)) should consist of two justices appointed by the Government of the United States, two by the Federal Government of Germany, and one who is neither a national of any of the Three Powers (United States, United Kingdom and France) nor a German national, to be appointed by agreement between the Government of the United States and the Federal Republic of Germany. Pursuant thereto, five justices were so appointed and on August 5, 1955, the Third Division of the Supreme Restitution Court, constituted as above indicated, came into existence.

No United States tribunal exists in Germany today dealing with restitution matters. Restitution matters in the United States Zone of the Federal Republic of Germany come within the jurisdiction of the above-mentioned international tribunal known as the Supreme Restitution Court. Restitution matters in Western Berlin (including the United States sector) are dealt with by another international tribunal consisting of one American, one British, one French, and three German members and a President selected by international agreement of the other Four Powers but who is not a national of any of them.

The appointment of the United States member of the Supreme Restitution Court and the United States member of the corresponding court in Berlin is a part of the exercise of the foreign affairs power as is true of the appointment of the United

States representatives in other international bodies. It appears obvious that appellee could not successfully claim that he must be appointed as a judge on the Supreme Restitution Court. However, it must be conceded that appellee did not have an opportunity to make such a claim when the case was before the District Court. If appellee desires to assert this right the appropriate course would be to remand the case to the District Court with instructions to allow appellee to amend his complaint. Of course, if appellee makes no claim that he is entitled to appointment to the Supreme Restitution Court, then it is submitted that this case must be remanded with instructions that the case be dismissed for failure to state a claim for relief within the jurisdiction of the District Court.

CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court granting appellee's motion for summary judgment be reversed, and the case remanded with directions that summary judgment be granted for appellant or in the alternative that the complaint be dismissed.

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APPENDIX

1. The pertinent provisions of the Foreign Service Act of 1946, 22 U. S. C. §§ 801 *et. seq.* (1952), are as follows:

[GENERAL PROVISIONS]

§ 801. Congressional declaration of objectives.

The Congress declares that the objectives of this chapter are to develop and strengthen the Foreign Service of the United States so as—

(1) to enable the Foreign Service effectively to serve abroad the interests of the United States;

(2) to insure that the officers and employees of the Foreign Service are broadly representative of the American people and are aware of and fully informed in respect to current trends in American life;

(3) to enable the Foreign Service adequately to fulfill the functions devolving on it by reason of the transfer to the Department of State of functions heretofore performed by other Government agencies;

(4) to provide improvements in the recruitment and training of the personnel of the Foreign Service;

(5) to provide that promotions leading to positions of authority and responsibility shall be on the basis of merit and to insure the selection on an impartial basis of outstanding persons for such positions;

(6) to provide for the temporary appointment or assignment to the Foreign Service of representative and outstanding citizens of the United States possessing special skills and abilities;

(7) to provide salaries, allowances, and benefits that will permit the Foreign Service to draw its personnel from all walks of American life and to appoint persons to the highest positions in the Service solely on the basis of their demonstrated ability;

(8) to provide a flexible and comprehensive framework for the direction of the Foreign Service in accordance with modern practices in public administration; and

(9) to codify into one chapter all provisions of law relating to the administration of the Foreign Service. (Aug. 13, 1946, ch. 957, title I, § 111, 60 Stat. 999.)

§ 802. Definitions.

When used in this chapter, the term—

(1) "Service" means the Foreign Service of the United States;

(2) "Secretary" means the Secretary of State;

(3) "Department" means the Department of State;

(4) "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States;

(5) "Government" means the Government of the United States of America;

(6) "Continental United States" means the States and the District of Columbia;

(7) "Abroad" means all areas not included in the continental United States as defined in paragraph (6) of this section;

(8) "Principal officer" means the officer in charge of an embassy, legation, or other diplomatic mission or of a consulate general, consulate, or vice consulate of the United States; and

(9) "Chief of mission" means a principal officer appointed by the President, by and with the advice and consent of the Senate, to be in charge of an embassy or legation or other diplomatic mission of the United States, or any person assigned under the terms of this chapter to be minister resident, charge d'affaires, commissioner, or diplomatic agent. (Aug. 13, 1946, ch. 957, title I, § 121, 60 Stat. 1000.)

* * * * *

§ 807. Prohibitions; political, racial, religious, or color discrimination.

In carrying out the provisions of this chapter, no political test shall be required and none shall be taken into consideration, nor shall there be any discrimination against any person on account of race, creed, or color. (Aug. 13, 1946, ch. 957, title X, § 1005, 60 Stat. 1030.)

* * * * *

§ 811a. Administration of Foreign Service; delegation of authority.

The Secretary of State, or such person or persons designated by him, notwithstanding the provisions of this chapter or any other law, except where authority is inherent in or vested in the President of the United

States shall administer, coordinate, and direct the Foreign Service of the United States and the personnel of the State Department. Any provisions in this chapter, or in any other law, vesting authority in the "Assistant Secretary of State for Administration", the "Assistant Secretary of State in Charge of the Administration of the Department", the "Director General", or any other reference with respect thereto, are amended to vest such authority in the Secretary of State. (May 26, 1949, ch. 143 § 3, 63 Stat. 111.)

* * * * *

[GOVERNING BODIES OF THE SERVICE]

PART A.—OFFICERS

§ 821. Director General; appointment; duties.

The Service shall be administered by a Director General of the Foreign Service, referred to in this chapter as the Director General, who shall be appointed by the Secretary from among Foreign Service officers in the class of career minister or in class 1. Under the general supervision of the Secretary and the Assistant Secretary of State in charge of the administration of the Department, the Director General shall, in addition to administering the Service and performing the duties specifically vested in him by this chapter or any other Act, coordinate the activities of the Service with the needs of the Department and of other Government agencies and direct the performance by officers and employees of the Service of the duties imposed on them by the terms of any law or by any order or regulation issued pursuant to law or by any international agreement to which the United States is a party. (Aug. 13, 1946, ch. 957, title II, § 201, 60 Stat. 1000.)

* * * * *

PART B.—BOARDS

§ 826. Board of the Foreign Service; composition; duties.

(a) The Board of the Foreign Service shall be composed of the Assistant Secretary of State in charge of the administration of the Department, who shall be Chairman; two other Assistant Secretaries of State, designated by the Secretary to serve on the Board; the Director General; and one representative each, occupying positions with comparable responsibilities, from the Departments of Agriculture, Commerce, and Labor,

designated, respectively, by the heads of such departments. The Secretary may request the head of any other Government department to designate a representative, occupying a position with comparable responsibilities, to attend meetings of the Board whenever matters affecting the interest of such department are under consideration.

(b) The Board of the Foreign Service shall make recommendations to the Secretary concerning the functions of the Service; the policies and procedures to govern the selection, assignment, rating, and promotion of Foreign Service officers; and the policies and procedures to govern the administration and personnel management of the Service; and shall perform such other duties as are vested in it by other sections of this chapter or by the terms of any other Act. (Aug. 13, 1946, ch. 957, title II, § 211, 60 Stat. 1001.)

§ 827. Board of Examiners for the Foreign Service; duties; composition.

(a) The Board of Examiners for the Foreign Service, shall, in accordance with regulations prescribed by the Secretary and under the general supervision of the Board of the Foreign Service, provide for and supervise the conduct of such examinations as may be given to candidates for appointment as Foreign Service officers in accordance with the provisions of sections 911 and 912 of this title or to any other person to whom an examination for admission to the Service shall be given in accordance with the provisions of this chapter or any other Act or any regulations issued pursuant thereto, and provide for such procedures as may be necessary to determine the loyalty of such persons to the United States and their attachment to the principles of the Constitution.

(b) The membership of the Board of Examiners for the Foreign Service, not more than half of which shall consist of Foreign Service officers, shall be constituted in accordance with regulations prescribed by the Secretary. (Aug. 13, 1946, ch. 957, title II, § 212, 60 Stat. 1001.)

[DUTIES OF OFFICERS AND EMPLOYEES]

PART A.—GENERAL

§ 841. Compliance with laws, international agreements, and executive orders.

Officers and employees of the Service shall, under the direction of the Secretary, represent abroad the interests

of the United States and shall perform the duties and comply with the obligations resulting from the nature of their appointments or assignments or imposed on them by the terms of any law or by any order or regulation issued pursuant to law or by any international agreement to which the United States is a party. (Aug. 13, 1946, ch. 957, title III, § 301, 60 Stat. 1001.)

§ 842. Regulations of Secretary governing duties.

The Secretary shall, except in an instance where the authority is specifically vested in the President, have authority to prescribe regulations not inconsistent with the Constitution and the laws of the United States in relation to the duties, functions, and obligations of officers and employees of the Service and the administration of the Service. (Aug. 13, 1946, ch. 957, title III, § 302, 60 Stat. 1001.)

§ 843. Delegation of authority to prescribe regulations.

In cases where authority to prescribe regulations relating to the Service or the duties and obligations of officers and employees of the Service is specifically vested in the President by the terms of this chapter or any other Act, the President may, nevertheless, authorize the Secretary to prescribe such regulations. (Aug. 13, 1946, ch. 957, title III, § 303, 60 Stat. 1002.)

* * * * *

[PERSONNEL CATEGORIES]

PART A.—CATEGORIES OF PERSONNEL

§ 861. Division of personnel.

The personnel of the Service shall consist of the following categories of officers and employees:

(1) Chiefs of mission, who shall be appointed or assigned in accordance with the provisions of section 901 of this title;

(2) Foreign Service officers, who shall be appointed in accordance with section 906 of this title, including those serving as chiefs of mission;

(3) Foreign Service Reserve officers, who shall be assigned to the Service on a temporary basis from Government agencies or appointed on a temporary basis from outside the Government in accordance with the provisions of section 922 of this title, in order to make

available to the Service such specialized skills as may from time to time be required;

(4) Foreign Service staff officers and employees, who shall be appointed in accordance with the provisions of section 936 of this title and who shall include all personnel who are citizens of the United States, not comprehended under paragraphs (1), (2), (3), and (6) of this section, and who shall occupy positions with technical, administrative, fiscal, clerical, or custodial responsibilities.

(5) Alien clerks and employees, who shall be appointed in accordance with the provisions of section 946 of this title; and

(6) Consular agents, who shall be appointed in accordance with the provisions of section 951 of this title. (Aug. 13, 1946, ch. 957, title IV, § 401, 60 Stat. 1002.)

* * * * *

PART E.—CLASSIFICATION OF POSITIONS

§ 886. Classification by Secretary.

Under such regulations as he may prescribe, the Secretary shall classify all positions in the Service, including those positions at foreign posts which may be held by career ministers, and shall allocate all positions occupied or to be occupied by staff officers or employees to classes and subclasses established by sections 870 and 887 of this title, respectively, and by alien employees and consular agents to such classes as may be established by regulation. (Aug. 13, 1945, ch. 957, title IV, § 441, 60 Stat. 1005.)

* * * * *

[APPOINTMENTS AND ASSIGNMENTS] •

PART A.—PRINCIPAL DIPLOMATIC REPRESENTATIVES

§ 901. Appointment and assignment by President.

(a) The President shall, by and with the advice and consent of the Senate, appoint ambassadors and ministers, including career ministers.

(b) The President may, in his discretion, assign any Foreign Service officer to serve as minister resident, charge d'affaires, commissioner, or diplomatic agent for such period as the public interest may require. (Aug. 13, 1946, ch. 957, title V, § 501, 60 Stat. 1007.)

* * * * *

PART B.—FOREIGN SERVICE OFFICERS

§ 906. Appointment by President to a class.

The President shall appoint Foreign Service officers by and with the advice and consent of the Senate. All appointments of Foreign Service officers shall be by appointment to a class and not to a particular post. (Aug 13, 1946, ch. 957, title V, § 511, 60 Stat. 1007.)

* * * * *

§ 909. Assignment and transfers.

A Foreign Service officer, commissioned as a diplomatic or consular officer, may be assigned by the Secretary to serve in any diplomatic position other than that of chief of mission or in any consular position, and he may also be assigned to serve in any other capacity in which he is eligible to serve under the terms of this or any other Act. He may be transferred from one post to another by order of the Secretary as the interests of the Service may require. (Aug. 13, 1946, ch. 957, title V, § 514, 60 Stat. 1008.)

* * * * *

§ 911. Admission to class 6.

No person shall be eligible for appointment as a Foreign Service officer of class 6 unless he has passed such written, oral, physical, and other examinations as the Board of Examiners for the Foreign Service may prescribe to determine his fitness and aptitude for the work of the Service and has demonstrated his loyalty to the Government of the United States and his attachment to the principles of the Constitution. The Secretary shall furnish the President with the names of those persons who have passed such examinations and are eligible for appointment as Foreign Service officers of class 6. (Aug. 13, 1946, ch. 957, title V, § 516, 60 Stat. 1008.)

* * * * *

§ 912. Admission to classes 1-5 without prior service in class 6.

A person who has not served in class 6 shall not be eligible for appointment as a Foreign Service officer of classes 1 to 5, inclusive, unless he has passed such written, oral, physical, and other examinations as the Board of Examiners for the Foreign Service may prescribe to determine his fitness and aptitude for the work of the Service; demonstrated his loyalty to the Govern-

ment of the United States and his attachment to the principles of the Constitution; and rendered at least four years of actual service immediately prior to appointment in a position of responsibility in the Service or in the Department or both, except that, if he has reached the age of thirty-one years, the requirement as to service may be reduced to three years. The Secretary shall furnish the President with the names of those persons who shall have passed such examinations and are eligible for appointment as Foreign Service officers of classes 1 to 5, inclusive. The Secretary shall, taking into consideration the age, qualifications, and experience of each candidate for appointment, recommend the class to which he shall be appointed in accordance with the provisions of this section. (Aug. 13, 1946, ch. 957, title V, § 517, 60 Stat. 1008.)

* * * * *

PART C.—FOREIGN SERVICE RESERVE OFFICERS

§ 921. Establishment of Reserve.

In accordance with the terms of this chapter and under such regulations as the Secretary shall prescribe, there shall be organized and maintained a Foreign Service Reserve, referred to in this chapter as the Reserve. (Aug. 13, 1946, ch. 957, title V, § 521, 60 Stat. 1009.)

§ 922. Appointments and assignments to Reserve.

Whenever the services of a person who is a citizen of the United States and who has been such for at least five years are required by the Service, the Secretary may—

(1) appoint as a Reserve officer for nonconsecutive periods of not more than four years each, a person not in the employ of the Government whom the Board of the Foreign Service shall deem to have outstanding qualifications of a specialized character; and

(2) assign as a Reserve officer for nonconsecutive periods of not more than four years each a person regularly employed in any Government agency, subject, in the case of an employee of a Government agency other than the Department of State, to the consent of the head of the agency concerned. (Aug. 13, 1946, ch. 957, title V, § 522, 60 Stat. 1009.)

§ 923. Appointment and assignment to a class.

A Reserve officer, appointed or assigned to active duty, shall be appointed or assigned to a class and not to a

particular post, and such an officer may be assigned to posts and may be transferred from one post to another by order of the Secretary as the interests of the Service may require. The class to which he shall be appointed or assigned shall depend on his age, qualifications, and experience. (Aug. 13, 1946, ch. 957, title V, § 523, 60 Stat. 1009).

* * * *

§ 926. Benefits.

A Reserve officer shall, except as otherwise provided in regulations which the Secretary may prescribe, receive all the allowances, privileges, and benefits which Foreign Service officers are entitled to receive in accordance with the provisions of subchapter IX of this chapter. (Aug. 13, 1946, ch. 957, title V, § 526, 60 Stat. 1010.)

* * * *

[FOREIGN SERVICE STAFF OFFICERS]

§ 936. Appointments.

The Secretary shall appoint staff officers and employees under such regulations as he may prescribe and, as soon as practicable, in accordance with the provisions of sections 886-888 of this title. (Aug. 13, 1946, ch. 957, title V, § 531, 60 Stat. 1010.)

§ 937. Assignments and transfers.

The Secretary may, in accordance with uniform procedures established in such regulations as he may prescribe, assign a staff officer or employee to a position at any post and transfer such a person from a position in one class to a vacant position within the same class, and from one post to another. Upon demonstration of ability to assume duties of greater responsibility, such person may, as provided in section 1016 of this title, be promoted to a vacant position in a higher class at the same or at a higher rate of salary and he may be transferred from one post to another in connection with such promotion. (Aug. 13, 1946, ch. 957, title V, § 532, 60 Stat. 1010.)

[ASSIGNMENTS]

§ 964. Assignment to trade, labor, agricultural, scientific, or other conferences.

An officer or employee of the Service may, in the discretion of the Secretary, be assigned or detailed for duty

with domestic or international trade, labor, agricultural, scientific, or other conferences, congresses, or gatherings, including those whose place of meeting is in the continental United States; or for other special duties, including temporary details under commission not at his post or in the Department. (Aug. 13, 1946, ch. 957, title V, § 574, 60 Stat. 1012.)

§ 965. Assignments to foreign governments.

The Secretary may, in his discretion, assign or detail an officer or employee of the Service for temporary service to or in cooperation with the government of another country in accordance with the provisions of the Act of May 25, 1938, as amended (52 Stat. 442; 53 Stat. 652). (Aug. 13, 1946, ch. 957, title V, § 575, 60 Stat. 1013.)

§ 966. Assignments to international organizations.

The Secretary may, in his discretion, assign or detail an officer or employee of the Service for temporary service to or in cooperation with an international organization in which the United States participates under the same conditions as those governing the assignment or detail of officers or employees of the Service to the government of another country in accordance with the provisions of the Act of May 25, 1938, as amended (52 Stat. 442; 53 Stat. 652). (Aug. 13, 1946, ch. 957, title V, § 576, 60 Stat. 1013.)

* * * * *

[PERSONNEL ADMINISTRATION]

PROMOTION

§ 991. Promotion of Foreign Service officers by selection.

All promotions of Foreign Service officers shall be made by the President, in accordance with such regulations as he may prescribe, by appointment to a higher class, by and with the advice and consent of the Senate. Promotion shall be by selection on the basis of merit. (Aug. 13, 1946, ch. 957, title VI, § 621, 60 Stat. 1014.)

* * * * *

SEPARATION

§ 1007. Separation for unsatisfactory performance of duty.

(a) The Secretary may, under such regulations as he may prescribe, separate from the Service any Foreign

Service officer above class 6 on account of the unsatisfactory performance of his duties; but no such officer shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service and the unsatisfactory performance of his duties shall have been established at such hearing.

(b) Any Foreign Service officer over forty-five years of age, separated from the Service in accordance with the provisions of subsection (a) of this section, shall be retired upon an annuity computed in accordance with the provisions of section 1076 of this title but not in excess of 25 per centum of his per annum salary at the time of his separation.

(c) Any Foreign Service officer under forty-five years of age, separated from the Service in accordance with the provisions of subsection (a) of this section, shall at the time of separation receive a payment equal to one year's salary or the refund of the contributions made by him to the Foreign Service Retirement and Disability Fund, whichever shall be greater.

(d) Any payments made in accordance with the provisions of this section shall be made out of the Foreign Service Retirement and Disability Fund. (Aug. 13, 1946, ch. 957, title VI, § 637, 60 Stat. 1016.)

§ 1008. Separation for misconduct or malfeasance.

The Secretary shall separate from the Service any Foreign Service officer or Reserve officer who shall be guilty of misconduct or malfeasance in office, but no such officer shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service and his misconduct or malfeasance shall have been established at such hearing. Any officer separated from the Service in accordance with the provisions of this section shall not be eligible to receive the benefits provided by sections 1061-1116 of this title, but his contributions to the Foreign Service Retirement and Disability Fund shall be returned to him in accordance with the provisions of section 1086 (a) of this title. (Aug. 13, 1946, ch. 957, title VI, § 638, 60 Stat. 1016.)

* * * * *

§ 1021. Unsatisfactory performance of duty.

The Secretary may, under such regulations as he may prescribe separate from the Service any staff officer or employee on account of the unsatisfactory performance of his duties, but no such officer or employee shall be

so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service and the unsatisfactory performance of his duties shall have been established at such hearing. (Aug. 13, 1946, ch. 957, title VI, § 651, 60 Stat. 1017.)

§1022. Misconduct or malfeasance.

The Secretary shall separate from the Service any staff officer or employee who shall be guilty of misconduct or malfeasance in office, but no such officer or employee shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service and his misconduct or malfeasance shall have been established at such hearing. (Aug. 13, 1946, ch. 957, title VI, § 652, 60 Stat. 1017.)

* * * * *

[THE FOREIGN SERVICE INSTITUTE]

§ 1041. Establishment of the Institute.

The Secretary shall, in order to furnish training and instruction to officers and employees of the Service and of the Department and to other officers and employees of the Government for whom training and instruction in the field of foreign relations is necessary, and in order to promote and foster programs of study incidental to such training, establish a Foreign Service Institute, hereinafter called the Institute. (Aug. 13, 1946, ch. 957, title VII, § 701, 60 Stat. 1018.)

* * * * *

2. The pertinent provisions of the original Veterans' Preference Act of 1944, 5 U. S. C. §§ 851 et seq. (1940 ed., Supp. I), are as follows:

§ 851. Persons entitled to federal employment preferences.

In certification for appointment, in appointment, reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Act of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-

servicemen and women who have served on active duty in any branch of the armed forces of the United States and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions. (June 27, 1944, ch. 287 § 2, 58 Stat. 387.)

§ 852. Examinations; earned ratings; additional credit.

In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned rating of those persons included under section 851 (1), (2), and (3) of this title, and five points shall be added to the earned rating of those persons included under section 851 (4) of this title: *Provided*, That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this chapter as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by a concurrent resolution of the Congress for such other positions as may from time to time be determined by the President. (June 27, 1944, ch. 287, § 3, 58 Stat. 388.)

§ 853. Credit for experience.

In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rat-

ing where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor. (June 27, 1944, ch. 287, § 4, 58 Stat. 388.)

§ 854. Waiver of physical and educational qualifications.

In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision. (June 24, 1944, ch. 287, § 5, 58 Stat. 388).

§ 855. Exemption from certain restrictive laws.

Preference eligibles shall not be subject to the provisions of section 641 of this title concerning two or more members of a family in the service, or to the provisions of section 633 of this title concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile. (June 27, 1944, ch. 287, § 6, 58 Stat. 389.)

§ 856. Register or lists of eligibles; entry rank.

The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over \$3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings. (June 27, 1944. ch. 287, § 7, 58 Stat. 389.)

§ 857. Certification of eligibles; selection from available names; exceptions; promotion of substitutes in postal service.

When, in accordance with civil-service laws, and rules, a nominating or appointing office shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be

sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement. (June 27, 1944, ch. 287, § 8, 58 Stat. 389.)

§ 858. Unclassified civil service; selection from qualified applicants.

In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 851 of this title, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this chapter. (June 27, 1944, ch. 287, § 9, 58 Stat. 389.)

§ 859. Periodic examinations by Civil Service Commission.

The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 851 (1), (2), and (3) of this title upon application for examination for any such position. (June 27, 1954, ch. 287, § 10, 58 Stat. 390.)

§ 860. Rules and regulations by Civil Service Commission.

The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this chapter. (June 27, 1944, ch. 287, § 11, 58 Stat. 390.)

§ 861. Reduction in personnel; considerations affecting release.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. (June 27, 1944, ch. 287, § 12, 58 Stat. 390.)

§ 862. Recertification and reappointment of resigned, dismissed, or furloughed employees.

Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent. (June 27, 1944, ch. 287, § 13, 58 Stat. 390.)

§ 863.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the

person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings, and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, ch. 287, § 14, 58 Stat. 390.)

§ 864. Separated or furloughed eligibles as entitled to reclassification and reappointment.

Any preference eligible, who has been furloughed or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government or of the District of Columbia, in the order as provided in section 856 of this title, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in section 856 and 857 of this title. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles,

when there are three or more names of preference eligibles on any appropriate reemployment lists for the position to be filled. (June 27, 1944, ch. 287, § 15, 58 Stat. 391.)

§ 865. Resigned eligibles as entitled to reclassification and reappointment.

Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 856 of this title, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in section 856 and 857 of this title. (June 27, 1944, ch. 287, § 16, 58 Stat. 391.)

§ 866. Definition of "Civil Service Commission" or "Commission".

The term "Civil Service Commission" or "Commission" as used in this chapter shall mean the present United States Civil Service Commission or any body or person who may be law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this chapter. (June 27, 1944, ch. 287, § 17, 58 Stat. 391.)

§ 867. Repeal of inconsistent laws; saving clause.

All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, or any department of the Government or officer thereof. (June 27, 1944, ch. 287 § 18, 53 Stat. 391.)

§ 868. Enforcement of rules and regulations by Commission.

It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof. (June 27, 1944, ch. 287, § 19, 58 Stat. 391.)

§ 869. Positions exempt from chapter.

Nothing contained in this chapter is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with, the advice and consent of the United States Senate: *Provided, however,* That the provisions of this chapter shall apply to appointments under sections 31a, 31b, and 39a, of title 39. (June 27, 1944, ch. 287, § 20, 58 Stat. 391.)

3. Section 19 of the Veterans' Preference Act, as amended, 5 U. S. C. § 868 (1952), provides as follows:

§ 857. Certification of eligibles; selection from available names; exceptions; promotion of substitutes in postal service.

When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided,* That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and shall be complied with by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated repre-

sentative upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept unless such vacancies are filled by transfer or reinstatement. (As amended Aug. 14, 1953, ch. 485, § 2, 67 Stat. 582.)

4. Section 14 of the Veterans' Preference Act, as amended, 5 U. S. C. § 863 (1952), provides as follows:

§ 863. Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission for an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided, That* such preference eli-

gible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, ch. 287, § 14, 58 Stat. 390; Aug. 4, 1947, ch. 447, 61 Stat. 723.)

5. Section 8 of the Veterans' Preference Act, as amended, 5 U. S. C. § 857 (1952 Supp. 1), provides as follows:

§ 868. Enforcement of rules and regulations by Commission.

It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof: *Provided*, That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency. (June 27, 1944, ch. 287, § 19, 58 Stat. 391; June 22, 1948, ch. 604, 62 Stat. 575.)

